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REAL PROPERTY STATUTES OF ONTARIO :  
BEING  
A SELECTION  
OF  
ACTS OF PRACTICAL UTILITY.

BY  
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## PREFACE.

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IN offering to the public this book on Real Property Statutes, the author is presenting the results of materials collected and of evenings spent during several years. It has been his aim to produce a work that will be of practical service to the profession; and, with this aim in view, such statutes only have been selected as, by the number of decided cases bearing on them, seemed to demand a Commentary. To bring all the Statutes of Ontario that in any degree relate to Real Property within the compass of a reasonable volume, to be sold at a reasonable price, would have been impossible. On the other hand, to take single Acts and expand their meaning to the utmost in separate volumes would have been too ambitious and expensive a scheme to find favour with the profession. The author has chosen the middle course, and a perusal of the Table of Contents will, it is believed, shew that a liberal selection has been made of Useful Statutes well interlined with Judge-made Law.

That the scheme of the book may be the better understood, it may be as well to explain the method employed in fitting together the annotations. First, the cases in our own Courts in Ontario were searched; and, wherever it was practicable, a consistent statement of the law was made from these cases. Then resort was had to the English cases and to cases in the other Canadian Courts, where the same seemed applicable. The American cases and the text-writers were only applied to when the other sources were exhausted. As a result of this method, the Ontario cases

will be found set forth with considerable fulness, and generally in the *ipsissima verba* of the decisions; while the substance of the other cases appears in a more condensed form.

As to the number of cases cited, although the Index includes some twenty-two hundred, yet no effort has been made to heap up the citations. On the contrary, it has been the author's desire to give just such decisions under each section as would serve to develop the branch or branches of law with which the section particularly deals. Moreover in the foot notes he has generally appended to each case, its date and a precis of its subject matter, wherever such subject matter could be given in small compass.

In selecting which to follow of the innumerable branches of law that are suggested by various sections of enactments embraced in this book, the author has consulted utility and avoided antiquarian researches. Some few sections, however, referred to ancient rules and doctrines of law; and under such sections, have been given the necessary explanations. For, without some explanation, the phraseology of these sections might cause error; as happened where some one mistook the right of entry mentioned in section 9 of R. S. O. c. 100 (*infra*), for the ordinary right of entry on a forfeiture, and so furnished us with a decided case under that section.

As the arrangement of the notes under the various sections of the different Acts has prevented the collecting of all the matter bearing on each subject in the same portion of the book, it was necessary to insert a full Table of Contents and a full analytical Index, including an index to the various statutes and sections of statutes cited. The Real Property Statutes of most of the other Provinces of Canada, though somewhat differently arranged from those of Ontario, very frequently contain identical provisions.

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Great minuteness of reference and cross-reference in the Index, will enable any lawyer in those Provinces to use the commentary for purposes of his own local law.

While it is too much to hope that a new work of this size should be absolutely free from misprints and errors, no pains have been spared to secure accuracy; it is hoped that the table of errata contains nearly all the necessary corrections; and these the reader is requested to carry into the text.

The author desires to thank his father, Mr. J. Howard Hunter and his brother Mr. W. H. Hunter, Barristers-at-law, for their constant assistance, and also his numerous friends in the profession for their valuable suggestions, in the preparation of this work.

A. T. HUNTER.

June 15th, 1894.

Equity Chambers, Toronto.

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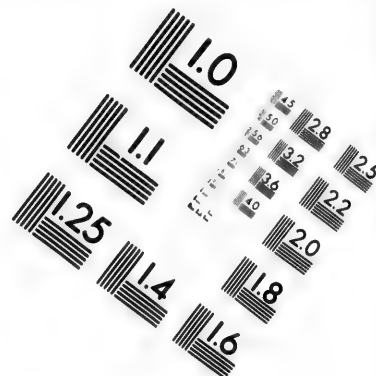
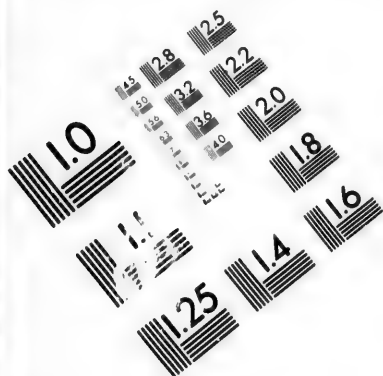
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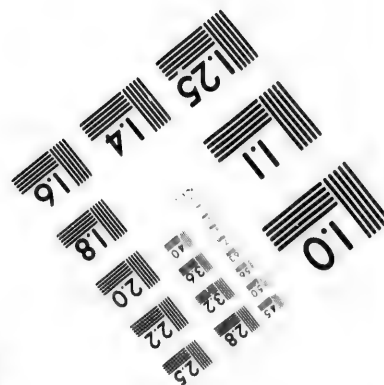
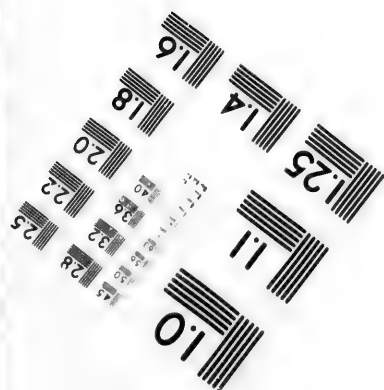
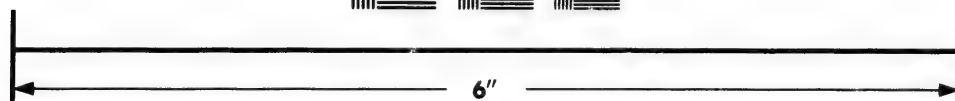
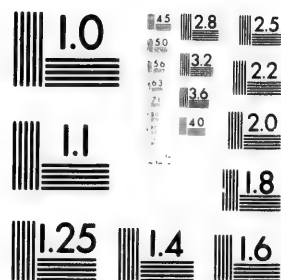
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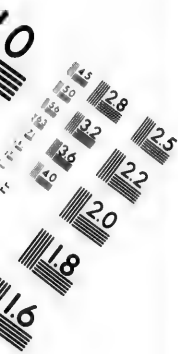


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# ERRATA AND ADDENDA.

- Page 2, Line 1, for "R. S. O. 1887," read "R. S. O. 1877."  
 5, Note (z), "8 V." read "8 & 9 V."  
 7, (c), "29 Car. 11." read "29 Car. II."  
 8, 2nd line from bottom, for "as," read "is."  
 9, Note (s), for "7 Q. B. D." read "17 Q. B. D."  
 40, (g), "c. 118," read "c. 18."  
 44, 6th line from bottom, for "condition," read "consideration."  
 46, Line 5, for "49 V. c. 20 (3)," read "49 V. c. 20 (O.)."  
 49, Note (u), "(1883)," read "(1884)."  
 51, To note (h), add "see further, on subject of appurtenances, *Re* Peck and School Board for London, L. R. 1893, 2 Ch. 315."  
 59, Note (g), after "W. N. 115," add "1893, 1 Ch. 523."  
 88, (k), for "(1886)," read "(1866)."  
 109, Line 10, "42 V. c. 29," read "42 V. c. 20."  
 112, Note (g), "18 Q. B. D." read "17 Q. B. D."  
 141, (u), "Culvert," read "Culbert."  
 173, (z), "Whitstone," read "Whetstone."  
 183, (c), "be," read "been."  
 248, (k), "Holdness v. Lang," read "Holderness v. Lang."  
 257, 259, in head note, for "Cap. 106," read "Cap. 107."  
 262, Note (h), add "affirmed 21 A. R. 144."  
 272, (s), at the end thereof, "See continuation of discussion by Mr. H. Symons, 13 C. L. T. 279."  
 280, (also pages 352, 363, 371), for "Haggarty," read "Hagarty."  
 281, Note (b), for "c. 5," read "c. 6."  
 286, (l), "Tillis," read "Tillie."  
 329, (x), "R. S. O. 1877," read "R. S. O. 1887."  
 346, Line 11, "on advancement," read "an advancement."  
 353, Note (e), "Weslake," read "Westlake."  
 355, Line 15, "Foster v. Paterson," read "Forster v. Paterson."  
 359, at end of Note (w), for "*supra*," read "*infra*."  
 367, Note (x), for "Austee v. Nelins," read "Anstee v. Nelms," and for "Archibald," read "Archbold."  
 409, (w), Worssam v. Vandenbrande, for "16 W. R." read "17 W. R."  
 411, Line 9 from bottom, for "sub-section," read "section."  
 432, 6, before "acknowledgment," insert "such."  
 443, Note (f), Banner v. Berridge, for "28 Ch. D." read "18 Ch. D."  
 461, Notes (v) and (w), to reference Kent v. Kent, add "19 A. R. 352 (1892)."  
 473, Line 15 from bottom, insert "be" before "shewn."  
 489, last line of text, for "his user," read "one's user."  
 508, Line 13, for "*Re* Lauder and Bagley," read "*Re* Lander and Bagley."  
 553, 12 from top, for "application," read "applicant."

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## R. S O. 1887, CHAPTER 100.

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An Act

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HER MAJESTY, by and with the advice and consent of  
the Legislative Assembly of the Province of Ontario  
enacts as follows:—

1. Where the words following occur in this Act they shall be  
construed in the manner hereinafter mentioned, unless a con-  
trary intention appears:—

Interpre-  
tation.

*Phraseology of section*:—The compact phrase "unless a  
contrary intention appears" is taken from 49 V. c. 20 (O.)  
which adopted it from the (Imperial) Conveyancing Act,  
1881.

R. S. O. 1887, c. 98 introduced the definitions with the following elaborate limitation:—

"The words and expressions hereinafter mentioned, which in their ordinary significance have a more confined, or a different meaning, shall in this Act, except when the nature of the provision, or the context of the Act, excludes such construction, be interpreted as follows;" a form that is still retained in R. S. O. 1887, c. 108, s. 11, (Devolution of Estates).

49 V. c. 20, also defined "land" and "mortgage," but the revisors have preferred to retain the definitions of these two words already contained in R. S. O. 1877, c. 98.

"Land."

(1) "Land" shall extend to messuages, lands, tenements and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land or of any interest therein. R. S. O. 1877, c. 98, s. 1 (1); 49 V. c. 20, s. 3 (2).

*Land*:—"The word [*land*] strictly doth signify nothing but arable land; but in a larger sense it doth comprehend any ground, soil or earth whatsoever, and, therefore, by a grant of all lands, do pass arable lands, meadows, pastures, woods, moors, waters, marshes, furzes, heath and such like, and the castles, houses and buildings thereupon, but not rents, advowsons, and such like things. Also by grant of any land in possession, the reversion thereof will pass. And yet by the grant of a reversion of land, the land in possession will not pass" (a).

"And lastly the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to heaven; for *cujus est solum, ejus est usque ad coelum*" (b); "also all that is *infra*, as mines (c), earth, clay, quarries and the like" (d).

(a) Touch. 91.

(b) Co. Litt. 4a. See as to this maxim in *Re Metropolitan Dist. Ry. Co. and Cosh*, 13 Ch. D. 607 (1880); *Corbett v. Hill*, L. R. 9 Eq. 671 (1870); *Doe v. Burt*, 1 T. R. 701 (1787).

(c) But see *Mines Case*, 1 Plow. 336, as to gold or silver.

(d) Touch. 90.

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(f) See Ey  
Lamb, 30 Ch. D.  
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O. R. 626 (1886)

(g) Burton  
(1875).

(h) *Re Par*

(i) *Per Bu*

(j) *Touch.*

(k) *Feene*

(l) *Ib.*, see  
*Jessel, M. R.*,

(m) See *T*  
*Ad. & Ell.* 442  
*Saund.* 400.

*What may pass under land in its ordinary legal sense*:—If land with a run of water upon it be sold the water passes with the land (*e*). Houses, mills and woods may pass under "lands" unless its meaning is cut down by the context (*f*).

*Real estate, etc., wider than "land" in its ordinary legal sense*:—"Real estate" and "real property" have a legal signification, which embraces many interests, to express which the word "land" is not appropriate (*g*). "Real estate," however, will not cover all possible interests in land: thus in a case under the Insolvent Act of 1875 it was held that an interest in a mortgage was not "real estate" within the meaning of that Act (*h*).

"*Messuages*"—is synonymous with and includes perhaps more than "house" (*i*). While properly speaking "messuage" may include not only the dwelling house, but also a little garden or plot of ground attached to the dwelling (*j*), yet the word does not necessarily imply more than a dwelling house (*k*), and may even mean a set of chambers, i.e., a part only of a house (*l*).

"At this day, indeed, the distinction suggested in the early cases (*m*) between *messuage* and *house*, in regard to the greater comprehensiveness of the former, is not to be relied on; and it is clear that even the word *messuage*

(*e*) *Canham v. Fisk*, 2 Cr. & J. 126, 2 Tyr. 155 (1831).

(*f*) See *Ewer v. Hayden*, Cro. Eliz. 476, 658, followed in *Re Portal and Lamb*, 30 Ch. D. 54 (1885). See also as to signification of "land" *Re Bush and Commissioners of Niagara Falls Park*, 14 A. R. 73 (1887); *Re Melville*, 10 O. R. 626 (1886).

(*g*) *Burton, J., in Toronto Street R. W. Co. v. Fleming*, 37 U. C. R. 126 (1875).

(*h*) *Re Parsons*, 4 A. R. 184 (1879).

(*i*) *Per Butler, J., in Scholes v. Hargreaves*, 5 T. R. 46 (1792).

(*j*) *Touch*. 94.

(*k*) *Feene v. Grafton*, 2 Bing. N. C. 618 (1836).

(*l*) *Ib.*, see also *Yorkshire Insurance Co. v. Clayton*, 8 Q. B. D. 423 (1881), *Jessel, M.R., citing Evans and Finch's Case*, Cro. Car. 340.

(*m*) See *Thomas v. Lane*, 2 Ch. Ca. 26; *Doe d. Norton v. Webster*, 12 Ad. & Ell. 442 (1840); *Hill v. Grange*, Plow. 164; *Smith v. Martin*, 2 Wms. Saund. 400.



would not now be held to carry land beyond a homestead or orchard, though contiguous to, or enjoyed with it" (n).

*Tenements and hereditaments*:—The most comprehensive words of description applicable to real estate are *tenements and hereditaments*; as they include every species of realty, as well corporeal as incorporeal (o).

"Tenement is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, . . . but hereditament is the largest word of all in that kind; for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal or mixed" (p).

Thus a freehold rent-charge may be a tenement (q); but an annuity in fee, not being a rent-charge is an hereditament, but not a tenement, neither is a condition a tenement but it is an hereditament (r).

"Tenement, though in its vulgar acceptation it is only applied to houses and other buildings yet in its original, proper and legal term signifies everything that may be holden, provided it be of a permanent nature (s); whether it be of a substantial and sensible or of an unsubstantial, ideal kind" (t). In its vulgar acceptation, Tenement means house or dwelling-house (u). "The common people still use the word, as in the days of Blackstone, to mean a house" (v).

(n) Jarman on Wills, 5th ed. (1893), Vol. I, 735. See *Doe d. Clements v. Collins*, 2 T. R. 502 (1788); *King v. Wycombe Rail Co.*, 28 Beav. 104 (1860); *Roe d. Walker v. Walker*, 3 B. & P. 375 (1803).

(o) Jarman on Wills, 5th ed. (1893), Vol. I, 733.

(p) Co. Litt. 6a.

(q) *Druitt v. Christchurch Colt. Reg.*, Ca. 328. See *Dodds v. Thompson*, L. R. 1 C. P. 133 (1865).

(r) See *Hopewell v. Aokland*, 1 Salk. 239 (1710); 3 Rep. 26; *Preston Addas v. Touch* 91.

(s) It must be permanent; e.g., a portable booth used by strolling players was held not a tenement: *Fredericks v. Howie*, 1 H. & C. 381 (1862).

(t) 2 Bl. Com. 16.

(u) See *Yorkshire Ins. Co. v. Clayton*, 8 Q. B. D. 423 (1881); *Dashwood v. Ayles*, 55 L. J. Q. B. 10 (1885); *Minifie v. Banger*, W. N. (1885), 189.

(v) *Per Cotton, L.J.*, in *Dashwood v. Ayles*, *supra*.

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(w) *Wilde, C.J.*

(x) *Tompkins v. 8 Ex. 249 (1852); M. "use," Plowd. 58; as to other estates; Ingram, 2 Ves. Jun*

(y) See *East Lo Ell. N. S. 512 (1831) Manchester & Salfor Shrewsbury Gas Co.*

(z) 8 V. c. 16, 18

(a) 31 Geo. III. by the authority af within the said Prov mon soccage, in like soccage in that part where lands shall be

"Hereditament is defined in the text books of authority to signify all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed, come to him who is next of blood, and not to the executors or administrators, as chattels do" (*w*).

Hereditament is used not to describe the *quantum* of interest, but the thing itself which is the subject-matter of the interest, and so leaseholds may be included (*x*).

*Effect of words "messuages, lands, tenements and hereditaments"*:—The collocation of words in the present section is not a particularly happy one. For there are several reported cases where the words "tenements and hereditaments" have had their signification cut down by their being used following "messuages" and other words; on the principle that they must be understood according to the antecedent enumeration and as comprising only matters *ejusdem generis* (*y*).

*Original section*:—The words of this sub-section seem to be an amplification of the definition of lands to be found in the Land Clauses Acts of 1845 (*z*), viz., "The word 'lands' shall extend to messuages, lands, tenements and hereditaments of any tenure."

The words "of any tenure" are not necessary in Ontario where land is held in free and common soccage (*a*). And,

(*w*) Wilde, C.J., in *Lloyd v. Jones*, 6 C. B. 90 (1848).

(*x*) *Tompkins v. Jones*, 22 Q. B. D. 599 (1889); see *Chew v. Holroyd*, 8 Ex. 249 (1852); *Moore v. Denn*, 2 Bos. & P. 251 (1890); see further as to a "use," *Plowd.* 58; 3 Rep. 2b; and also *Norris v. Le Neve*, 3 Atk. 81 (1744), as to other estates; as to meaning under Stat. of Frauds, see *Buckeridge v. Ingram*, 2 Ves. Jun. 657 (1795).

(*y*) See *East London Waterworks Co. v. Mile-End Old Town*, 17 Ad. & Ell. N. S. 512 (1851); *Colbrooke v. Tickell*, 4 Ad. & Ell. 916 (1836); *King v. Manchester & Salford Waterworks Co.*, 1 B. & C. 630 (1823); and also *Reg. v. Shrewsbury Gas Co.*, 3 B. & Ad. 216 (1832).

(*z*) 8 V. c. 16, 18 & 20 (Imp.), s. 3.

(*a*) 31 Geo. III. c. 31 (Imp.), s. 43 (1791):—"And be it further enacted by the authority aforesaid, that all lands which shall be hereafter granted within the said Province of Upper Canada, shall be granted in free and common soccage, in like manner as lands are now holden in free and common soccage in that part of Great Britain called England; and that in every case where lands shall be hereafter granted within the said Province of Lower

besides, these words have in England given rise to a doubt whether an incorporeal hereditament—not being the subject of any tenure—would be included (*b*). Such a doubt is not possible with the words of our definition, “whether corporeal or incorporeal.”

*Classes of Incorporeal Hereditaments*:—“There are three kinds of pure Incorporeal Hereditaments :

1. Appendant, *e.g.*, Seignories, Manorial Rights of Common, Advowsons (appendant to a manor);

2. Appurtenant, *e.g.*, Rights of Common, of Way, or of Light annexed to land and arising by grant or prescription;

3. In gross, *e.g.*, Seignories severed from a Manor; Rent-Seck; Rent-Charge; Common in Gross; Advowsons (generally); Tithes; Titles of Honour; Offices” (*c*).

Of practical importance to us are those incorporeal hereditaments in class 2, and also “Rent-charge” in class 3.

*Estate*:—The meaning of this word is investigated with very great pains by Haggarty, J., in *O'Neil v. Carey* (*d*). He says: “There is a vast mass of cases illustrating the meaning of the word ‘estate’ in wills; nothing that I have as yet seen as to its use, by itself, in a deed . . . . I have come to the opinion that, by the legal usage of centuries, whether in devises or elsewhere, the word “estate” has acquired an intrinsic meaning, including interest in landed as well as other property, That in popular phraseology, the estate of a deceased man is universally under-

Canada, and where the grantee thereof shall desire the same to be granted in free and common socage, the same shall be so granted; but subject, nevertheless, to such alterations with respect to the nature and consequences of such tenure of free and common socage as may be established by any law or laws which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of the Province.”

(*b*) See *Pinchin v. L. & B. Ry. Co.*, 5 D. M. & G. 861 (1854); *G. W. Ry. Co. v. Swindon*, L. R. 9 App. Cas. 808 (1884).

(*c*) Stroud's Judicial Dictionary, p. 381. As to an estate in a church pew, see under sub-section 7, *infra*.

(*d*) 8 C. P. 339 (1859), citing over a score of authorities; see also *Doe Evans v. Evans*, 9 A. & E. 726 (1839); *McCabe v. McCabe*, 22 U. C. R. 378 (1863); *Macdonald v. The Georgian Bay Lumber Co.*, 2 A. R. 36 (1877).

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(*e*) 29 Car. 11

(*f*) 9 Q. B. 1

(*g*) 39 Chy. 2  
(1887); *Gray v. S*

(*h*) For cases  
(1878), and cases  
*v. Lawrence*, 22 C  
*Re Christmas*, 33

(*i*) *Martin v.*

(*j*) *Tasker v.*  
N. S. 268 (1865).  
Works, 36 L. T. 2  
Morris, 52 L. J. 2  
of support, light,  
L. R. 19 Eq. 346  
2 Dr. & Sm. 423 (

stood to mean his general property, real and personal, that popularly 'a man's estates' would certainly be descriptive of his landed possessions."

*Interest*:—By section 4 of the Statute of Frauds (*e*) no contract for the sale of lands, tenements or hereditaments or "any interest in or concerning them" is valid unless evidenced by writing. Some of the decisions have given this phrase "any interest," etc., a very wide significance. Thus in *Webber v. Lee* (*f*), the right to shoot and carry away game was held an interest in land; and in *Lavery v. Pursell* (*g*), the sale of standing buildings to be taken down and cleared away in two months was held a sale of an interest in land (*h*). As to growing trees, see *Summers v. Cook*, 28 Gr. 179; *Macdonell v. McKay*, 15 Gr. 391; *McNeill v. Haines*, 17 O. R. 479; and cf. *McGregor v. McNeill*, 32 U. C. C. P. 538.

Under the Imperial Land Clauses Consolidation Act, 1845, an interest in land would include an equitable interest (*i*), but not a contract for purchase (*j*).

"And to money subject to be invested, etc." This is by no means an unusual extension of the meaning of *land*. The rule in equity is that money directed to be laid out in land, is by "*transmutation*" of the courts administering equity, changed into land, in accordance with the maxim

(*e*) 29 Car. 11, c. 3.

(*f*) 9 Q. B. D. 315 (1882).

(*g*) 39 Chy. D. 508 (1888); see also *McManus v. Cooke*, 35 Ch. D. 681 (1887); *Gray v. Smith*, 43 Ch. D. 208 (1889).

(*h*) For cases under Mortmain Act, see *Attree v. Halve*, 9 Ch. D. 337 (1878), and cases there reviewed; also *Re Harris*, 15 Ch. D. 561 (1880); *Jarvis v. Lawrence*, 22 Ch. D. 202 (1882); *Brook v. Badley*, L. R. 3 Ch. 672 (1868); *Re Christmas*, 33 Ch. D. 332 (1886); *Re David*, 43 Ch. D. 27 (1889).

(*i*) *Martin v. London, C. & D. Ry.* L. R. 1 Chy. 501 (1866).

(*j*) *Tasker v. Small*, 3 Myl. & Cr. 63 (1837); *Bird v. G. E. Ry.*, 19 C. B. N. S. 268 (1865). For further cases, see *Syers v. Metropolitan Board of Works*, 36 L. T. 277 (1877), interest of tenant after notice to quit; *Barham v. Morris*, 52 L. J. 237 (1882), and *Swainston v. Finn*, 52 L. J. 235 (1882), right of support, light, etc.; *Re Thomas*, 34 Ch. D. 166 (1886), and *Lacey v. Hill*, L. R. 19 Eq. 346 (1875), interest in part of proceeds of sale; *Thomas v. Cross*, 2 Dr. & Sm. 423 (1864).

"that what is agreed to be done must be considered as done" (k).

"Mortgage." (2) "Mortgage" shall include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the payment of money or money's worth lent, and to be reconveyed, re-assigned or released on satisfaction of the debt. R. S. O. 1877, c. 98, s. 1 (3).

"Mortgagor." (3) "Mortgagor" shall include every person by whom any such conveyance, assignment, pledge or charge as aforesaid is made.

"Mortgagee." (4) "Mortgagee" shall include every person to whom or in whose favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred. R. S. O. 1877, c. 98, s. 1 (4, 5).

*Mortgage distinguished from purchase*:—There are four degrees by which a mortgage shades into a purchase (1) a mortgage, unequivocally a mortgage; (2) an apparently absolute conveyance with a collateral arrangement for redemption (l); (3) an absolute conveyance, with an agreement for repurchase (m); and (4) an absolute conveyance simply.

It is often a nice point to decide how far an instrument as a mortgage or a deed of purchase. The matter has been discussed very fully in an article in the "Canadian Law

(k) *Guidot v. Guidot*, 3 Atk. 256 (1745); see also *Rashley v. Masters*, 1 Ves. 201 (1790); *Chandler v. Pocock*, 15 Ch. D. 491 (1880); *Re Greaves*, 23 Ch. D. 313 (1883).

(l) See *Bartels v. Benson*, 21 U. C. R. 143 (1861); *McIlroy v. Hawke*, 5 Gr. 516 (1856); *Kerr v. Murray*, 6 Gr. 343 (1857); *Watson v. Munro*, 8 Gr. 60 (1860); *Bernard v. Walker*, 2 E. & A. 121 (1863); *Sampson v. McArthur*, 8 Gr. 72 (1860); *Cherry v. Morton*, 8 Gr. 402 (1860); *Malloch v. Pinhey*, 9 Gr. 550 (1862); *Fallon v. Keenan*, 12 Gr. 388 (1866); *Cayley v. McDonald*, 14 Gr. 540 (1868); *Healey v. Daniels*, 14 Gr. 633 (1868); *Dornyn v. Fralick*, 21 Gr. 191 (1874); *Aitchison v. Coombs*, 6 Gr. 643 (1858); *Glass v. Freckleton*, 10 Gr. 470 (1864); *Monk v. Kyle*, 17 Gr. 537 (1870); *Moore v. Hobson*, 14 Gr. 703 (1868); *Roach v. Lundy*, 19 Gr. 243 (1872); *Rose v. Hickey*, 3 A. R. 309 (1873); *Mundell v. Tinkiss*, 6 O. R. 625 (1885); *Peterkin v. McFarlane*, 9 A. R. 429, 13 S. C. R. 677 (1885); *Rudd v. Frank*, 17 O. R. 758 (1889); *Klock v. Chamberlin*, 15 S. C. R. 325 (1888).

(m) See *Doe Shannon v. Roe*, 5 O. S. 484 (1837); *Bostwick v. Phillips*, 6 Gr. 427 (1858); *Harris v. Meyers*, 7 L. J. 243; *Bullen v. Renwick*, 8 Gr. 342, 9 Gr. 202 (1862); *Fink v. Patterson*, 8 Gr. 417 (1860); *O'Rielly v. Wilkes*, 8 L. J. 135; *McDonald v. McDonald*, 2 E. & A. 393 (1864); *Hawke v. Millikin*, 12 Gr. 236 (1866); *Rapson v. Hersee*, 16 Gr. 683 (1869); *Monk v. Kyle*, 17 Gr. 537 (1870); *Clarke v. Little*, 5 Gr. 303 (1856); *McCann v. Dempsey*, 6 Gr. 192 (1857); *Robertson v. Scobie*, 10 Gr. 557 (1864); *Wells v. Ritchie*, 6 O. S. 13 (1840); *Livingston v. Wood*, 27 Gr. 515 (1880).

Times," before, and above, and *v. Ontario J.*, (p) says cases in w and cut absolute i kind, as is *Matthews* not only t ing in the intention satisfaction court below *Rose v. Hi* that the e the clearer character."

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(s) See *Ex p* Q. B. D. 222.

Times," by Mr. C. H. F. Lefroy (*n*). It will suffice, therefore, to refer the reader to that article, to the cases cited above, and to the judgment in the recent case of *McMicken v. Ontario Bank* (*o*). In this last-mentioned case, Gwynne, J., (*p*) says: "I do not think it necessary to review the cases in which parol evidence has been received to qualify and cut down a deed of conveyance of land which is absolute in its terms into a mortgage. In cases of this kind, as is laid down by the Privy Council in *Holmes v. Matthews* (*q*), the *onus* rests altogether upon the appellant not only to rebut the presumption that the title as appearing in the written instrument is in accordance with the intention of the parties, but he must also establish to the satisfaction of the appellate court that the judgment of the court below adverse to his contention is erroneous. In *Rose v. Hickey* (*r*), decided in this Court in 1880, we held that the evidence necessary for this purpose must be of the clearest and most conclusive and unquestionable character."

(5) "Property" shall include real and personal property, and any debt, and any thing in action, and any other right or interest. 49 *V. c.* 20, s. 3 (1). "Property." *Imp. Act, 44-45 V. c.* 41, s. 2.

The clause of the Imperial Act (s. 2, s-s. 1) is somewhat fuller; after "real and personal property" occurs the phrase "and any estate or interest in any property, real or personal."

The definition of property in the Imperial Act will include the chattels contained in a bill of sale (*s*).

*Property*:—"Property is the most comprehensive of all terms which can be used, inasmuch as it is indicative

(*n*) 1 C. L. T. 403, 461, "Mortgage or no Mortgage: Admission of Parol Evidence."

(*o*) 20 S. C. R. 548 (1892).

(*p*) *Ib.* at p. 575, referring to *Lincoln v. Wright*, 5 Jur. N. S. 1142 (1859).

(*q*) 9 Moore P. C. 413.

(*r*) Cass. Dig. 292.

(*s*) See *Ex parte Stanford*, 7 Q. B. D. 259; *Ex parte Official Receiver*, 18 Q. B. D. 222.

and descriptive of every possible interest which the party can have" (t).

The burden of proof lies upon those who say that the word is not used in its ordinary, correct and proper sense (u).

*Distinction between property and power* :—"The power of a person to appoint an estate to himself, is no more his 'property' than the power to write a book or to sing a song" (v).

"*And any debt . . . and any other right*" :—"The future receipts in a person's business are not comprised in property (w). It seems that unpaid capital in a joint stock company is not within a power enabling the directors to manage "property" of the company (x), but might be if the power extended to *property and rights* (y).

"*And any thing in action*" :—"Property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recovered is called a thing, or *chose in action*. Thus money due on a bond is a *chose in action*; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose in action*; for though a right to some recompense vests in me at the time of the damage done, yet what and

(t) *Jones v. Skinner*, 5 L. J. Ch. 90 (1835).

(u) *Morrison v. Hope*, 4 De G. & S. 236 (1851).

(v) *Re Armstrong*, 55 L. J. Q. B. 579 (1885).

(w) In *Bankruptcy, Ex parte Nichols*, 22 Ch. D. 782 (1882). Cf. *Re Toward*, 14 Q. B. D. 310 (1884); *Re Davis*, 22 Q. B. D. 193 (1888). As to alimony, see *Re Robinson*, 27 Ch. D. 160 (1883); *Harrison v. Harrison*, 58 L. J. P. D. & A. 28 (1888); *Jump v. Jump*, L. R. 8 P. D. 159 (1882).

(x) *Bank of S. Australia v. Abrahams*, L. R. 6 P. C. 265 (1874).

(y) *Howard v. Patent Ivory Co.*, 23 Ch. D. 156 (1888). See also *Bower v. Foreign & Col. Gas Co.*, W. N. (1877) 222.

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how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution" (*yy*).

"Property" was held to include a husband's interest in a wife's *chose* in action which he had not reduced into possession (*z*).

(6) "Conveyance" shall include feoffment, grant, assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property; and "convey" has a meaning corresponding with that of conveyance. R. S. O. 1877, c. 98, s. 1 (2); 49 V. c. 20, s. 3 (3).

"Conveyance."

"Convey."

This definition is a fusion of the definition in R. S. O. c. 98, s. 1 (2), viz: "Conveyance shall include a feoffment, grant, lease, surrender or other assurance of land," and of the definition in 49 V. c. 20, s. 3 (3).

*Conveyance made by deed*:—The conveyance in the present sub-section is to be an instrument *made by deed*. Otherwise conveyance has a wider signification. Thus in *Doe Baker v. Clark* (*a*), Robinson, C.J., interpreting the words "*deed or conveyance*" in a statute (*b*), cited a number of authorities in favor of the decision he came to, that a will of lands is treated in law as a conveyance.

*Ordinary sense of "conveyance"*:—In a case under one of the Imperial Registry Acts (*c*), Lord Cairns, L.C., said:

(*yy*) Bl. Comm. Vol. II. p. 396.

(*z*) *Re Biaggi*, 26 S. J. 417 (1882). For further cases on meaning of "property," see *Re McCutcheon v. Corporation of City of Toronto*, 22 U. C. R. 613 (1863); *Kidd v. O'Connor*, 43 U. C. R. 193 (1878); as to interpretation in a will, see *Tyrone v. Waterford*, 1 De G. F. & J. 613 (1859), *Arnold v. Arnold*, 2 My. & K. 365 (1834), *Gover v. Davis*, 29 Beav. 222 (1860); *McNahan v. Harrison*, 1 J. & H. 662 (1861), *Belamy v. Belamy*, 35 Beav. 469 (1866); as to meaning in Succession Duties Act, *Re Cigala*, 7 Ch. D. 351 (1877); *Colquhoun v. Brooks*, 14 App. Ca. 493 (1889); as to meaning in Bankruptcy, see *Sear v. Lawson*, 15 Ch. D. 426 (1879); *Re Higgins*, 21 Ch. D. 85 (1881), *Re Maughan*, 14 Q. B. D. 986 (1884).

(*a*) 7 U. C. R. 44 (1859); but cf. *Hibblewhite v. McMorine*, 6 M. & W. 200 (1839); *Societe Generale de Paris v. Walker*, 11 App. Ca. 20 (1885).

(*b*) 3 V. c. 74 (U.C.), s. 16, relating to the conveyance of lands to the Church of England.

(*c*) West Riding Registry Act, 2 & 3 Anne, c. 4.



"There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land. Now, an instrument giving to a person a charge upon land gives him an interest in the land—if he had a mortgage already it gives him a further interest; and so, whether made in favour of a person who has already a charge, or of another person, it is a conveyance of an interest in the land" (*d*).

"*Made by deed*": "A deed *factum*. This word (deed) in the understanding of the common law is an instrument written in parchment or paper, whereunto ten things are necessarily incident, viz., first, writing; secondly, in parchment or paper; thirdly, a person able to contract; Fourthly, by a sufficient name; fifthly, a person able to be contracted with; sixthly, by a sufficient name; seventhly, a thing to be contracted for; Eighthly, apt words required by law; Ninthly, sealing (*e*); and tenthly, delivery. A deed cannot be written upon wood, leather, cloth or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered or corrupted" (*f*).

*Meaning of "forward a deed"*:—Where one agrees to "forward" a deed, it is incumbent on him to do all that is necessary to forward it, *i.e.*, give it being, prepare and execute it as well as forward it (*g*).

*Meaning of "execute and deliver a deed"*:—"We think, under the agreement, as it is set out, the deed was to be

(*d*) *Credland v. Potter*, L. R. 10 Ch. 8 (1874). For further cases as to "conveyance" under the Registry Acts (Imp.), see *Sumpter v. Cooper*, 2 B. & Ad. 223 (1831); *Neve v. Pennell*, 33 L. J. Ch. 23 (1863); *Re Wight's Mortgage Trust*, L. R. 16 Eq. 41 (1873); *Moore v. Culverhouse*, 27 Beav. 639 (1859); *R. v. Truro*, 21 Q. B. D. 535 (1887). For other cases, see *Phelps v. Hornstedt*, L. R. 8 Ex. 26 (1872); *Woodhouse v. Murray*, L. R. 2 Q. B. 634, 4 *Id.* 27 (1868); *Christie v. Inland Revenue*, L. R. 2 Ex. 46 (1866); *Thames Conservators v. Inland Revenue*, 18 Q. B. D. 279 (1886); *Inland Revenue v. Angus*, 23 Q. B. D. 579 (1889); *Lewis v. Inland Revenue*, 37 W. R. 509 (1888).

(*e*) Sealing should be with wax or a wafer, a mere circle enclosing the words "L.S." or "place for seal" is insufficient, *Re Balkis Co.*, 36 W. R. 392 (1888).

(*f*) *Co. Litt* 35 b. For further information, see *Elphinstone on Deeds*.

(*g*) *Dalglish v. Conboy*, 26 U. C. C. P. 264 (1876).

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prepared by the plaintiff—that is by the purchaser—as is usual, when the writing does not indicate a contrary intention, as we think it does not here, because the defendant does not engage to *convey* or *make* a title or conveyance . . . but only that he will *execute* and *deliver* a deed, which means no more, we think, than that he will *execute*” (*h*).

*Convey* :—The word “convey” has not the legal technical meaning assigned to the word “exchange” (*i*).

“*Convey, assign and deliver*” are operative words of conveyance (*j*).

“Purchaser” shall include a lessee or mortgagee, and an intending purchaser, lessee or mortgagee, or other person, who for valuable consideration, takes or deals for any property; and “purchase” has a meaning corresponding with that of purchaser; but sale means only a sale properly so called. 49 V. c. 20, s. 3 (6).

“Purchaser.”

“Purchase.”

*Purchase* :—Purchase has two significations, a technical and a popular. Technically speaking, a person acquires “by words of purchase” and is a “purchaser” when he obtains title in any other mode than by descent or devolution of law (*k*).

The popular acceptance of the word *purchase* is as a correlative to the word “sale.” This popular usage is of considerable antiquity. Thus in 27 Elizabeth, c. 4, the word occurs; and according to Mr. May (*l*), “the word ‘purchase’ as used in the statute, of course refers to cases of selling and purchasing in the ordinary and vulgar acceptance of the word, and not in the technical sense of any person who obtains land otherwise than by descent.”

(*h*) *Smith v. Doan*, 15 U. C. R. 636 (1858). *Robinson, C.J.*

(*i*) *Draper, C.J.*, in *Leach v. Dennis*, 24 U. C. R. 131 (1864).

(*j*) *Patterson, J.A.*, in *McDonald v. Georgian Bay Lumber Co.*, 2 A. R. 47 (1877). See *Cameron v. Wait*, 3 A. R. 175 (1878), for effect of “may convey.”

(*k*) *Co. Litt.* 18 b.

(*l*) *Fraudulent Conveyances*, 2nd ed. 217; citing *Ex parte Hilman*, 10 Ch. D. 625 (1879).

Under the same Act of Elizabeth it has been held in the Canadian Courts that a judgment creditor is not a purchaser for value (*m*).

"Sale" implies that there shall be a vendor and a purchaser (*n*).

*Purchase of pew*:—"The words *absolute purchase* of any pew in the church, mentioned in the 7th section of the statute [*Church Temporalities Act*], do not mean that the purchaser is to hold free from all claim or control of the incumbent or churchwardens, or free from all interest of these persons in the general property of the church; but they are used in opposition to the rights of leaseholders of pews, and of those who have only sittings; and subject to the necessary incidents of such species of property, a person may not improperly be said to be an *absolute purchaser* of, and to *have a freehold of inheritance* in, the pew which he has bought; for the right of freehold in a church only extends to the sittings therein: *Pawson v. Scott* (Say. 177); and possession as has just been stated must be taken to be at all times *secundum subjectam materiam*."

"The estate or interest which a pew-holder has is a tenement as much so as an advowson in gross: *Gully v. Bishop of Exeter* (4 Bing. 294); and it lies only in grant, and not in livery, because it is an incorporeal hereditament; Co. on Litt. 9th ed." (*o*).

Corporeal tenements, etc., deemed to lie in grant, etc.

2. All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. R. S. O. 1877, c. 98, s. 2.

*Immediate freehold*:—"By *immediate freehold* is meant the first of all the estates of freehold. Thus where A. is

(*m*) *Gillespie v. Van. Egmond*, 6 Gr. 533 (1858); *Goodwin v. Williams*, 5 Gr. 539 (1856).

(*n*) *King v. England*, 4 B. & S. Q. B. 785 (1864); therefore where a landlord took distrained goods at an appraisement it was held not a sale under 2 W. & M. c. 5.

(*o*) *Ridout v. Harris*, 17 U. C. C. P. 88 (1866).

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Real Property c. 7, s. 2.

tenant for life, remainder to B. for life or in fee, etc., B. has an *estate of freehold*, but A. has the immediate estate of freehold (*p*).

*Grant and livery*:—"Grant" is here opposed to "livery" and so is used in a technical sense. "The word (grant) being taken more strictly and properly, it is the grant, conveyance or gift by writing, of such an incorporeal thing as lieth in grant and not in livery and cannot be given or granted by word only without deed" (*q*). A grant, then, is a transfer by deed. A livery is the transfer or delivery of the seisin, *i.e.*, feudal possession; and though usually it was accompanied by the delivery of a deed (called a deed of feoffment), still the main essential of a livery was a physical ceremony, such as the vendor handing the purchaser a turf of land; a ceremony which ordinarily took place on the land itself and was symbolic of an actual delivery of the land.

The rule in feudal times was to have a livery of everything that could be delivered, *i.e.*, of all corporeal property.

But besides corporeal there exists another kind of property which, not being of a visible and tangible nature, is denominated *incorporeal*. This kind of property, though it may accompany that which is corporeal, yet does not in itself admit of actual delivery and must therefore be transferred by writing, *i.e.*, by grant. Thus arose the distinction that incorporeal property was said to lie in grant and corporeal property was said to lie in livery (*r*).

*Bargain and sale; lease and release*:—Livery of seisin has its disadvantages. Accordingly various shifts have been tried to get over the necessity of so cumbrous a formality; which shifts the present enactment (*s*) has

(*p*) 1 Preston's Conv. at p. 48.

(*q*) Touch. 228.

(*r*) Williams on Real Property, 7 ed. p. 220.

(*s*) Originally section 2 of 8 & 9 V. c. 106 (Imp.) commonly called the Real Property Amendment Act of 1845. Enacted in U. C. by 14 & 15 V. c. 7, s. 2.

rendered unnecessary by abolishing the necessity for livery. One of the earliest devices was to deliver the property in trust for, or as it was then termed, "to the use of," the purchaser. Then came the Statute of Uses (*t*), the effect of which is to convert such a use into the legal seisin. Of this statute the conveyancers took advantage to make a conveyance called a "bargain and sale," *i.e.*, a sale to the use of the purchaser, the effect of which is to transfer the seisin without a livery of the same. The "bargain and sale" is a form of deed that formerly was much used in Upper Canada until the introduction of the short forms of conveyances. In England more than at any time in Canada were always felt certain disadvantages that were inherent to the bargain and sale. The doctrine that there cannot be a use upon a use renders this form of conveyance improper for anything like a complicated settlement (*u*). For the bargainor can transfer the seisin to the bargainee but cannot give the bargainee a power of appointment whereby a third party by virtue of the deed of bargain and sale is invested with the seisin; the effect of the conveyance is exhausted in transferring the seisin to the bargainee.

Hence in England where settlements are very usual, another form of conveyance was imperatively necessary, and was the more desired as the bargain and sale was required to be publicly enrolled (*v*), thereby destroying the privacy of the conveyance. It was soon discovered that the statute as to enrolments, being concerned only with freeholds, did not affect bargains and sales for terms of years. Moreover a grant for a term of years, *i.e.*, a lease, not being a conveyance of freehold, did not require livery of seisin, and a subsequent release had the effect of vesting the seisin in the lessee in possession. Accordingly a bargain

(*t*) 27 Hen. VIII. c. 10.

(*u*) See Challis on Real Property, 316.

(*v*) 27 Hen. VIII. c. 16.

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and sale for a year, followed by a release, became the modern conveyance by *lease* and *release*, a form of transfer quite commonly found in registered titles in Ontario.

This conveyance necessitated two deeds. The first step was taken in 1841 to simplify matters by "An Act for rendering a Release as Effectual for the Conveyance of Freehold Estates as a Lease and Release by the same parties" (*w*). The next and final step was this present enactment. There is no longer the necessity for a livery; although the ceremony itself is still a possible mode of conveyance subject to the following section.

3. A feoffment otherwise than by deed shall be void at law, and no feoffment shall have any tortious operation. R. S. O. 1877, c. 98, s. 3.

Feoffments  
unless by  
deed to be  
void.

*Feoffment*:—The feoffment is a form of assurance not often occurring in titles to land in Ontario. There is, however, nothing to prevent the use of so cumbrous a form either in Ontario or in England. "It is believed that certain old corporate bodies still retain, at all events to some extent, their ancient habit of conveying by feoffment" (*x*).

The effect of the first portion of the present section is to make the deed of feoffment the important feature in the conveyance. That the deed was not always necessary we learn from the following passage: "This kind of conveyance albeit it may be made in most cases by word without any writing, yet is most commonly done by writing, and this writing is then called a deed or charter of feoffment; but hence the division of a feoffment by word, or a feoffment by writing" (*y*).

(*w*) 4 & 5 V. c. 21 (Imp.); cf. 12 V. c. 71 (Can.) s. 2.

(*x*) Challis on Real Property, at p. 321 (1885), referring, of course, to English corporations.

(*y*) Touch. p. 203.

The effect of the Statute of Frauds (z) would be to necessitate a writing, and by the present clause that writing must be a deed (a).

*Origin of present section*:—The original enactment from which the first portion of this section is taken is as follows,—

"That a feoffment made after the said 1st October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed" (b).

We have omitted from our Act (c) the exception as to customary conveyances by infants, as we have no "customs" in this Province (d).

The second portion of the present section is taken from the next succeeding section of the Imperial Act (e).

*Tortious operation*:—The nature of a feoffment with a tortious operation will be explained by the following passage,—

"The former delivery of the seisin or feudal possession, which always took place in a feoffment, rendered it, till recently, an assurance of great power; so that, if a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated *by wrong*, as it is said, and would have conferred on the feoffee the whole estate limited by the feoffment along with the seisin actually delivered. Thus if a tenant for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely

(z) 29 Car. II. c. 3, s. 4.

(a) As to effect of destruction of feoffment-deed, see *Doe d. Edgitt v. Stiles*, 1 Kerr, 338 (1841).

(b) 8 & 9 V. c. 106 (Imp.), s. 3. The custom referred to is the custom of gavelkind.

(c) Originally 14 & 15 V. c. 7 (Can.), s. 3.

(d) *Grand Hotel Co. v. Cross*, 44 U. C. R. 153 (1879).

(e) 8 & 9 V. c. 106 (Imp.), s. 4.

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have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong (*f*); accordingly, such a feoffment by a tenant for life was regarded, as we have seen, as a cause of forfeiture to the person entitled in reversion; such a feoffment being in fact a conveyance of his reversion, without his consent, to another person" (*g*).

In consequence of the present enactment, such a feoffment by a tenant for life will merely convey his life interest, and will not be a cause of forfeiture.

4. (1) In a deed, or other instrument, it shall not be necessary, in the limitation of an estate in fee simple to use the words heirs; or in the limitation of an estate in tail to use the words heirs of the body; or in the limitation of an estate in tail male or in tail female, to use the words heirs male of the body, or heirs female of the body.

Words of limitation unnecessary. Imp. Act, s. 51.

(2) For the purpose of such limitation it shall be sufficient in a deed, or other instrument, as in a will to use the words in fee simple, in tail, in tail male, or in tail female, according to the limitations intended, or to use any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, a conveyance shall pass all the estate, right, title, interest, claim and demand, which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. This sub-section applies only if and as far as a contrary intention does not appear from the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

Provision for all the estate, etc.

Imp. Act, s. 63.

(4) This section applies only to conveyances made after the first day of July, 1836. 49 V. c. 20, s. 4.

Section 4 may best be treated under two divisions: I. Effect of inappropriate words of limitation. II. Effect of no words of limitation.

I. *Inappropriate or non-technical words of limitation*:—Under this heading come sub-sections (1) & (2),

(*f*) A feoffment had the effect of barring or destroying contingent remainders depending upon particular estates; *Archer's Case*, 1 Rep. 66a.

(*g*) *Williams on Real Property*, 7th ed. 136.



which are an expansion of the following provision of the Imperial Act. (*h*).

"51. (1) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words 'in fee simple,' without the word 'heirs,' and in the limitation of an estate in tail, to use the words 'in tail' without the words 'heirs of the body,' and in the limitation of an estate in tail male or in tail female to use the words 'in tail male' or 'in tail female' as the case requires, without the words 'heirs male of the body' or 'heirs female of the body.'"

*As in a will*.—It will be noticed that our Legislature has inserted the words "or other instrument," "as in a will," "or to use any other words sufficiently indicating the limitation intended." The words "as in a will" in the second sub-section produce a slight ambiguity. Is it the meaning,

(1) that it shall be sufficient in a deed or other instrument (*e.g.*, a will) to use, etc. ? or

(2) that it shall be sufficient in a deed or other instrument (not a will), just as it is sufficient in a will, to use, etc. ?

A little consideration will show us that the latter is the correct interpretation and that it is the intention of the Legislature to set a rule for interpreting limitations of estates in deeds uniform with the rule already existing in the case of wills.

*Thus as to deeds*.—As may be inferred from the first sub-section, the words "heirs," "heirs of the body," etc., are the appropriate words to limit estates in fee simple, fee tail, etc. Not only so, but the general rule before the passing of the present enactment was that in deeds no estate in fee simple could be created without the word "heirs," and no estate in fee tail could be created without the words "heirs of the body," and similarly in case of

(*h*) 44 & 45 V. c. 41 (Imp.), s. 51.

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estates in tail male and tail female (*i*). The effect of neglect to use these words was well expressed in the following extract: "If one grant land to J. S. to have and to hold to him in fee simple, or in fee tail, without saying [to him and his heirs, or to him and his heirs males, or the like], this is but an estate for life and no more. So if one grant land to J. S. to have and to hold to him and his seed, or to him and his issues generally, without more words, by this is made only an estate for life. But in the construction of a will the law is otherwise in most of these cases" (*j*).

*But as to wills*:—"Even under wills made before 1838 (*k*) an estate in fee simple might have been created by any expressions, however informal, which denoted the intention. Thus the inheritance in fee was held to pass by a devise to A. *in fee simple*, to A. *forever*, or to him *and his assigns forever*" (*l*).

II. *No words of limitation*:—Sub-section 3 is an expansion of section 63 of the Imperial Act (*m*), the text of which is as follows:—

63. (1) "Every conveyance shall by virtue of this Act be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed, or expressed, or intended so to be, or which they respectively have power to convey in, to, or on the same."

The addition of the words "when no words of limitation are used," also the retention of the words "This sub-section applies only if and as far as a contrary intention does not appear, etc." (*n*), read in connection with the final

(*i*) See Elphinstone on Deeds, at pp. 224, 231, and the exceptions there collected.

(*j*) Touch. at p. 106.

(*k*) The date of coming into force of 1 V. c. 26.

(*l*) Jarman on Wills, 5th ed. at p. 1133.

(*m*) 44 & 45 V. c. 41 (Imp.).

(*n*) *Ib.* s. 63 (2).

words of the very similar section 30 of R. S. O. 1887, c. 109 (o), make manifest the intention to have a uniform rule of construction in deeds and wills. What that rule is will appear from the following extract, which, though expressed in relation to wills only, is now equally applicable to deeds.

"The effect of the enactment (p), it will be observed, is not wholly to preclude . . . the question whether an estate in fee simple will pass without words of limitation, but merely to reverse the former rule. Formerly, nothing more than an estate for life would pass by an indefinite devise unless a contrary intention could be gathered from the context.

Now, an estate in fee will pass by such a devise, 'unless a contrary intention shall appear by the will.' The *onus probandi* (so to speak) under the present law lies on those who contend for the restricted construction" (q).

As to deeds, the former rule was the same as that expressed in division I. of the notes to this section.

As to wills, R. S. O. 1887, c. 109, has the following section:

30. When any real estate is devised to any person without any words of limitation, such devise shall, subject to *The Devolution of Estates Act*, be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention appears by the will."

*Old rule*:—This enactment is taken from 1 V. c. 26 (Imp.), s. 28; before which Act the unsatisfactory state of the law may be learned from the following extract: "Nothing was better settled than that a devise of messuages, lands, tenements or hereditaments (not estate), without words of limitation, occurring in a will which was not

(o) See below for text.

(p) 1 V. c. 26 (Imp.); R. S. O. 1887, c. 109, s. 30.

(q) Jarman on Wills, 5th ed. at p. 1135.

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subject to the statute, 1 V. c. 26, conferred on the devisee an estate for life only. A conviction that the rule was generally subversive of the actual intention of testators, always induced the courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested" (r). The rule of construction under said section 30 has already been given above.

*Sub-section 4*:—1st July, 1886, is the date provided in 49 V. c. 20 (Ont.), for that enactment to take effect (s).

5. Freehold land or chattels real may be conveyed by a person to himself jointly with another person, by the like means by which the same might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person. R. S. O. 1877, c. 95, s. 10; 49 V. c. 20, s. 6.

Conveyance  
by a person  
to himself,  
etc.  
Imp. Act.  
s. 50.

*Origin of present section*:—The first portion of this section is a fusion of two enactments.

R. S. O. 1877, c. 95, had the following section:

"10. Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person, or persons or corporations, by the like means as he might assign the same to another (t)."

Such section related only to personalty, and the later enactment, 49 V. c. 20, s. 6, was intended to supplement the former by extending the principle to realty.

The present section 5 is therefore made up of the later enactment with the words "chattels real" taken from the older section and substituted for the words "a thing in action."

The law as to personalty in general is preserved in our statutes in R. S. O. 1887, c. 122, which has the following section:

(r) Jarman on Wills, 5th ed. 1131.

(s) 49 V. c. 20 (Ont.), s. 2.

(t) 29 V. c. 28 (Can.), s. 19; 22 & 23 V. c. 35 (Imp.), s. 21.

"8. Any property, real or personal, may be conveyed or assigned by a person to himself jointly with another person, by the like means by which it might be conveyed or assigned by him to another person; and may in like manner be conveyed or assigned by a husband to his wife, and by a wife to her husband alone or jointly with another person. R. S. O. 1877, c. 95, s. 10; 49 V. c. 20, s. 6."

*Jointly with another*.—It seems that the first part of this section 5 is intended to apply only to a conveyance in joint tenancy, as in the ordinary case of the appointment of a new trustee. "If land conveyed by A. is to be held in common by himself and B., the proper course is either for A. to convey an undivided share to B., or to convey the entirety to B. to the use of himself and B. as tenants in common. The latter form would be adopted only to make covenants run with the land" (u).

*Nature of joint tenancy*.—Of both realty and personalty there may be a joint tenancy; and, strictly speaking, such joint tenancies should be distinguished by four unities, —(1) unity of possession, (2) unity of interest, (3) unity of title, and (4), unity of the time of the commencement of such title (v). Now for A., being already the owner, (as trustee or otherwise) to convey to himself and B., as joint tenants, would be inconsistent with these unities.

Accordingly it was formerly necessary that a third party should be introduced, through whom the title should pass to A. and B. as joint tenants. The introduction of such a third party tends, of course, to render a conveyance more cumbrous and expensive; and the object of the present section is to simplify the conveyance in such cases.

Exceptions as to the necessity for unity of time already existed in the case of conveyances by virtue of the Statute of Uses, and in the case of estates created by will (w).

(u) Wolstenholme and Turner, 5th ed. p. 102.

(v) Williams on Personal Property, 10th ed. 341. on Real Property, 7th ed. 123.

(w) Williams on Real Property at p. 126.

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(x) 10th ed.

(y) Williams

*Conveyances between husband and wife*:—The second portion of the present section 5 has been rendered necessary by modern legislation conferring on married women the power to hold separate property.

The ancient rights of the husband in the personal property of the wife are thus expressed in Williams on Personal Property (x):

"In the first place then personal property of the ancient kind, namely chattels personal or moveable goods, belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute property of her husband in the same manner precisely as if they had originally been his own, or had been subsequently given to him. He may dispose of them as he pleases in his lifetime or by his will, they will be subject to his debts, and if he should die intestate, the wife would have no further claim to them than to any other of his effects. So imperative is this rule that if chattels personal be given to a married woman jointly with a stranger the law will instantly sever the jointure and make the husband and the stranger *tenants in common*." A necessary consequence of the husband's absolute property in the wife's personalty was that a gift, by him to his wife, of personalty would be meaningless.

*Gift of realty by husband to wife*:—As to realty, there was another ground rendering inoperative the gift by husband to wife:—"Another consequence of the unity of husband and wife is the inability of either of them to convey to the other. As a man cannot convey to himself, so he cannot convey to his wife, who is part of himself. . . . But by means of the Statute of Uses the effect of conveyance by a man to his wife can be produced; for a man may convey to another person to the use of his wife in the same manner as under the statute, we have seen, a man may convey to the use of himself" (y).

(x) 10th ed. 415.

(y) Williams on Real Property, 7th ed. at p. 208.

*Covenant by man with himself*:—Seemingly, in a deed by A. to himself and B., as joint tenants under the first portion of the present section, a covenant made by A. with A. and B. would not be enforceable" (z).

Receipt in deed sufficient. Imp. Act, ss. 54, 55.

6. A receipt for consideration money or securities contained in the body of a conveyance shall be a sufficient discharge to the person paying or delivering the same, without any further receipt being indorsed on the conveyance, and shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof. 49 V. c. 20, s. 10.

*Origin of section*:—This section is a condensation of the Imperial Act (a), ss. 54 (1) and 55 (1). The value of the abbreviation is rendered doubtful by an omission of several useful words. The Imperial Act agrees with ours in making the receipt in the body of the conveyance a sufficient discharge to the *person paying* or delivering "consideration money or securities." But it goes farther than ours in making (in favour of a *subsequent purchaser*) such receipt sufficient "for consideration money or other consideration." Now, as our legislators have chosen to sacrifice those words "or other consideration" to a desire for brevity, it is left extremely doubtful whether a receipt in the body of the conveyance for a consideration consisting of neither money nor securities, *e.g.* of truck, would be sufficient.

*Former rule in Equity*:—In Equity the tendency was to reckon the absence of a receipt endorsed on the conveyance (in addition to the receipt in the body of the conveyance) as a suspicious circumstance putting the subsequent purchaser upon his inquiry as to the actual fact of payment (b). The danger of extending such a doctrine is

(z) See *Faulkner v. Lowe*, 2 Ex. 595 (1848).

(a) 44 & 45 V. c. 41.

(b) See *Kennedy v. Green*, 3 My. & K. 699 (1834).

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(c) 20 Beav. 4  
(d) *Renner v.*  
(e) *Saunders*  
249 (1885); *Bicker*  
(f) 2 D. & J.  
Works, 24 Ch. D.



commented on by Sir John Romilly, M.R. in *Greenlade v. Dare* (c), where he declared that the result might be to unsettle titles in a very alarming manner.

The sections of the Imperial Act, from which the present section has been taken apply only to deeds executed after the commencement of that Act. But seemingly the present section applies to all deeds.

*What constitutes the receipt*:—The receipt in the body of the conveyance does not consist in the statement of the consideration. "In the ordinary case of purchase and mortgage deeds after the statement of the consideration, 'the sum of                      paid to A. by B.,' there followed the words 'of which sum A. hereby acknowledges the receipt'; and in the absence of the latter words there could be no receipt in the body of the deed" (d).

*Effect of receipt for full amount of mortgage money*:—Where a mortgagor executes a deed containing a receipt for the full amount named therein, he cannot as against a transferee, without notice, redeem except on payment of the full amount, although he has actually received only a portion of such amount (e).

7. On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

Rights of purchaser as to execution of purchase deed. Imp. Act, s. 8.

*Old law on the subject*:—In *Viney v. Chaplin* (f) a vendor insisted on executing the purchase deed without the purchaser or any agent of the purchaser being present. The Lord Chancellor, on being pressed to give an opinion

(c) 20 Beav. at p. 294 (1855).

(d) *Renner v. Tolley*, W. N. (1893), 90, *Sterling*, J.

(e) *Saunders v. Kent*, W. N. 1885, 147; cf. *Gordoa v. James*, 30 Ch. D. 249 (1885); *Bickerton v. Walker*, 31 Ch. D. 151 (1885).

(f) 2 D. & J. 466 (1858). See also *Re Bellamy & Metropolitan Board of Works*, 24 Ch. D. 387, 398 (1883).



in the abstract on this question, considered that while very little in the way of authority was to be found on this subject, yet there might, in some instances, be occasion for the purchaser to take such unusual precautions as to have an agent present at the execution. "The peremptory refusal of the vendor's solicitor to allow him to execute the conveyance in the presence of the purchaser's solicitor, with an intimation of his intention to bring an action for the purchase money, was unreasonable and unnecessary." This question is settled by the present section.

*Right to pay vendor personally*:—Neither the present section, however, nor the preceding one (6), settles the further point raised in *Viney v. Chaplin* (g), as to the extent of the purchaser's right to insist on paying the vendor personally, or at least on the vendor's solicitor having some written authority to receive the consideration money on behalf of the client.

The Imperial Act (h) contains a section on this subject that our legislators have not yet adopted :

"56. (1) When a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same, for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

The uncertainty that required the passing of such a section, and the absence of such a section from our statutes suggests the wisdom of the purchaser requiring the production of some "separate or other direction or authority in that behalf," before paying over to the vendor's solicitor.

(g) *Ib.* See also *Essex v. Daniell*, L. R. 10 C. P. 538 (1875); and *Ex. p. Swinbanks*, L. R. 11 Chy. D. 525 (1879).

(h) 44 & 45 V. c. 41.

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8. A partition and an exchange of land, and a lease required by law to be in writing of land, and an assignment of a chattel interest in land, and a surrender in writing of land not being an interest which might by law have been created without writing, shall be void at law, unless made by deed. R. S. O. 1877, c. 98, s. 4.

Partition or exchange of land, etc., unless by deed to be void.

*Origin of section*:—The original enactment was 8 & 9 V. c. 106 (Imp.), s. 3:

“ . . . and that a partition and an exchange of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing of any tenements or hereditaments, and an assignment of a chattel interest not being copyhold, in any tenements, not being a copyhold interest and not being an interest which might, by law, have been created without writing, made after the said 1st October, 1845, shall also be void at law unless made by deed ” (i).

*Partition*:—According to the common law, partition by agreement between parceners might be made as well by parol without deed, as by deed (j). So too, tenants in common might make partition by parol provided they afterwards confirmed it by livery (k). The Statute of Frauds, 29 Car. 2, c. 3, rendered writing necessary in all cases, but did not require a deed in any case where it was not required before that statute.

*Exchange*:—An exchange of things lying in livery does not appear to have required a deed at common law; but “ of things that lie in grant (l), as advowsons, rents, commons, etc., an exchange of them . . . is not good unless it be by deed ” (m). Since the Statute of Frauds an exchange affecting a larger interest in land than a three years’ term, must be in writing.

(i) Enacted in Can. by 14, 15 V. c. 7, s. 4, which still retained the words “tenements and hereditaments.”

(j) Litt. 250; Co. Litt. 169a.

(k) Co. Litt. 169a. As to a joint tenant, see *Ib.* at 187a and 199a.

(l) *i.e.* incorporeal hereditaments.

(m) Co. Litt. 505.

*Lease required by law to be in writing*.—The chief difficulties that may arise under the present section are as to the effect of "a lease required by law to be in writing of land."

The tendency of the courts for a while after the passing of this enactment was to construe a doubtful instrument (not under seal) as intended for a present demise, and as therefore invalid under 8 & 9 V. Thus, in *Stratton v. Pettit* (n), the Court decided: "The question in this case is, whether the instrument set forth in the declaration is a lease or an agreement. If it is a lease, it is void by the statute 8 & 9 V. c. 106, s. 3, and the defendant is entitled to judgment; if it is an agreement, it is not within the statute, and the plaintiff will succeed. . . . It is admitted that, before the statute, this instrument would have been held to be a lease; and, if the true rule be, that the intention of the parties as declared by the words of the instrument, must govern the construction, it is clear that the parties intended this instrument to operate as a lease. It is void as a lease." However, in subsequent cases, a more liberal construction prevailed: "It seems to me that the instrument declared on is an agreement and not a lease. The terms used manifestly show that that was the intention of the parties. Although at one period the courts strove to construe these documents to be present demises, yet, since the 8 & 9 V. c. 106, for the same reason, the judges will, if they contain words of agreement, construe them to be agreements only, and not demises *ut res magis valeat quam pereat*" (o).

Accordingly, an action could be brought on such an agreement against the intended landlord for having no title to grant a lease (p); or against the intended tenant

(n) 16 C. B. at p. 435 (1855); see also *Drury v. Macnamara*, 5 E. & B. 612 (1855).

(o) *Tidey v. Mollett*, 16 C. B. N. S. p. 298 (1864); see also *Bond v. Rosling*, 1 Best & S. 371 (1861); *Rollason v. Leon*, 7 Jur. N. S. 608 (1861).

(p) *Stranks v. St. John*, L. R. 2 C. P. 376 (1867).

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for not accepting a lease (*q*); or for not complying with the conditions and stipulations of the agreement (*r*). Indeed, the Court of Chancery went so far as to grant specific performance of such an agreement (*s*).

*Void at law*:—"The Legislature appears to have been very cautious and guarded in language, for it uses the expression 'shall be void at law,' that is as a lease. If the Legislature had intended to deprive such a document of all efficacy it would have said that the instrument should be 'void to all intents and purposes.' There are no such words in the Act" (*t*).

To summarize the results of the above authorities:—The effects of the present section 8 upon an *unsealed written instrument* are—

(1) The instrument not being a deed, is "*void at law*," and therefore does not operate as a demise of the land.

(2) The instrument will, if possible, be upheld as an agreement for a lease.

(3) Such an agreement may be enforced specifically or otherwise.

*Jurisdiction of County Courts over agreements for leases*:—In the recent English case of *Foster v. Reeves* (*u*), it was held that the County Court, having no equitable jurisdiction, and a claim for payment of rent being closely dependent on whether specific performance would be granted, therefore such a claim was not within the jurisdiction of the County Court. This case is interesting in view of the question that has been raised in our courts as to the equitable jurisdiction of the County Courts (*v*).

(*q*) *Rollason v. Leon*, *supra*.

(*r*) *Martin v. Smith*, L. R. 9 Ex. 50 (1874); *Adams v. Clutterbrick*, 10 Q. B. D. 403 (1883).

(*s*) *Parker v. Taswell*, 2 De G. & J. 558 (1858).

(*t*) *Ib.* at p. 569; see also *Bond and Rosling*, cited above, at p. 373.

(*u*) L. R. 1892, 2 Q. B. 255.

(*v*) See *Re M'Gugan v. M'Gugan*, 21 O. R. 294 (1891), in appeal.

*Relation of present section to Statute of Frauds:*—The question was suggested in *Hobbs v. Ontario Loan Co. (w)*, as to what effect this enactment had on that provision of the Statute of Frauds relating to the creation of leases. The words of the Statute of Frauds are (x):—"all leases, etc., . . . made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto, lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."

Now, it is clear that a lease required by the Statute of Frauds to be in writing is a "lease required by law to be in writing" within the meaning of 8 & 9 V. c. 106. But the point is, will the use of the words "shall be void at law" in the latter statute prevent such a lease from having "the force and effect of leases or estates at will only," according to the words of the Statute of Frauds (y)?

In this connection two cases may arise,—(1) where the parties making the lease have complied with the Statute of Frauds, but not with the statute of 8 & 9 V., and (2) where the agreement is not even in writing.

The first case and the tendency of the courts to treat the writing as an agreement have been already partially discussed. The second case needs a slight notice. The Statute of Frauds made the unwritten lease a lease at will; the courts did somewhat better. "Prior to *Walsh v.*

(w) 18 S. C. R. 483 (1890). Cf. *Kaatz v. White*, 19 U. C. C. P. 36 (1869); *McGinness v. Kennedy*, 29 U. C. R. 93 (1869); *Gibboney v. Gibboney*, 36 U. C. R. 236 (1875); *Galbraith v. Fortune*, 10 U. C. C. P. 109 (1861); *Lyman v. Snarr*, 10 U. C. C. P. 462 (1861); *Moore v. Kay*, 5 A. R. 261 (1880); *Carroll v. Williams*, 1 O. R. 150 (1882).

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*Lonsdale*, the doctrine was firmly established that where a person is let into possession under a mere agreement for a future lease, he becomes only a tenant at will; but it was equally well established, that when he pays or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy" (z). This is the principle as applied where possession has been taken under leases not in writing, and attempts were made to apply the same principle to cases of possession under leases in writing, but not evidenced by deed (a).

But in *Walsh v. Lonsdale* (b), Jessel, M.R., took a more radical view of the matter:—"There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance."

We may draw the following conclusions therefore:—

(1) Where a person is in possession under a writing which, though "void" as a lease under 8 & 9 V., is still enforceable in Equity by specific performance as an agreement for a lease, such person will be treated as a tenant on

(z) Woodfall, Landlord and Tenant, 13th ed. at p. 221.

(a) See *Tress v. Savage*, 4 E. & B. p. 36 (1854). Cf. *Lee v. Smith*, 9 Ex. 662 (1854); *Wood v. Beard*, L. R. 2 Ex. D. 37 (1876).

(b) 21 Ch. D. at p. 14 (1882), followed in *Allhusen v. Brooking*, 26 Chy. D. 565 (1884); *Lowther v. Heaver*, 41 Chy. D. 264 (1889).

the same terms as if the instrument were not "void" but a valid lease. But,

(2) Where the agreement is not one that can be enforced by specific performance (*c*), or where it is not in writing, then such person is treated as possessing a tenancy at will convertible by the courts into a tenancy from year to year in the manner already mentioned (*d*).

*Lease of incorporeal hereditaments*:—A lease of incorporeal hereditaments must be under seal; they cannot pass by parol (*e*). But in a case where a fishery was leased by parol, and the objection was taken that it was the grant of an incorporeal hereditament, and no interest passed, the agreement not being under seal, Parke, B., said:—"The defendant has enjoyed the fishery and must, therefore, pay for such enjoyment" (*f*).

*Necessity for notice to quit*:—Sometimes the tenant in occupation is placed in rather a better position by the lease being voided and his tenancy being turned into one from year to year. Thus, while in *Osborne v. Earnshaw* (*g*) there being agreement (not under seal) to let "for one, three or five years," it was held that the lease was void for five years, but good for three, and, therefore, that the three years being up, the tenant was not entitled to notice to quit; on the other hand, in *Caverhill v. Orvis* (*h*), a lease for five years, not under seal, was held to create a tenancy from year to year, and notice to quit was held necessary.

(*c*) See *Swain v. Ayres*, 21 Q. B. D. p. 293 (1888), distinguishing *Walsh v. Lonsdale*, cited above.

(*d*) The agreement must be a concluded agreement to create more than a tenancy at will. *Lenmore v. Westney*, 17 O. R. 472 (1889).

(*e*) *Gardner v. Williamson*, 2 B. & Ad. 336 (1831).

(*f*) *Holford v. Pritchard*, 3 Ex. 793 (1849). For further cases as to leases, see *Sheppard v. Hodsman*, 18 Q. B. 316 (1852), lease of tolls; *Burton v. Revell*, 16 M. & W. 307 (1847), and *Arden v. Sullivan*, 19 L. J. Q. B. 268 (1849); *Hurley v. McDonnell*, 11 U. C. R. 208 (1854), cases under 7 & 8 V. c. 76 (Imp.), s. 4, or 12 V. c. 71 (Can.), s. 4, which latter was repealed by 14 & 15 V. c. 7 (Can.).

(*g*) 12 U. C. C. P. 267 (1862).

(*h*) 12 U. C. C. P. 392 (1862). See also *Kantz v. White*, 19 U. C. C. P. (1869).

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*Assignments of chattel interests, i.e. of leases, etc.*—By section 3 of the Statute of Frauds, all assignments of leases are required to be by deed or note in writing signed by the assignors or their authorized agents. An interesting point, in this connection, arose in *Pollock v. Stacy* (i): the plaintiffs, being lessees of premises until a certain date, let, by parol, the premises to the defendant till that date, reserving a weekly rent; the defendant's contention was that as the plaintiffs intended to part with all their interest in the premises, they must be taken to have intended an assignment. Lord Denman, C.J., answered the objection as follows:—"The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by a parol lease. This they were at liberty to do at law; and we, therefore, carry their lawful intention into effect. If we were to decide that the transaction was an assignment, we should, at the same time, decide that it was no assignment, being by parol only; and we should construe that which was expressed and intended to be a lease to be an assignment, merely *et res pereat*, which is against a known salutary maxim" (j).

*Assignment valid as security for costs*:—In *Galbraith v. Irving* (k), D. being indebted to the plaintiff for costs in some suits and other matters, by an instrument not under seal assigned to him a lease of certain premises made by D. to the defendant, together with all rent in respect of said lease and the terms thereby created. Rose, J.—"It is clear that so far as this assignment is security for future services it is void, but it is valid as security for past services. . . . The language of the assignment is inapt. It professes to assign the *lease* and the rent now due and to accrue due in respect of the lease and the term thereby

(i) 9 Q. B. 1033 (1847).

(j) See further, *Debenham v. Digby*, 21 W. R. 359 (1873).

(k) 8 O. R. 751 (1885).



created. So far as it is an attempt to assign the reversion, it of course, is void, not being by deed; and it would also appear equally void so far as it is an assignment of future rent issuing out of the land (*l*), and carrying with it the right of distress, etc., and for the same reason, viz., not being by deed. See *Hopkins v. Hopkins*, 3 O. R. 233, and cases there cited" (*m*).

*Surrender in Writing*:—By section 3 of the Statute of Frauds, a surrender must be by deed or note in writing signed by the party so surrendering or his authorized agent. The same statute, however, makes an exception in favour of a surrender "by act and operation of law" (*n*).

The doctrine as to surrender by operation of law, is discussed in our Canadian case of *Gault v. Shepard* (*o*), in which the main question was whether certain acts of the plaintiffs amounted to an assent on their part to a new tenancy, thereby releasing the former tenants. The facts to support the theory of a new tenancy, related (1) to the payment of rent, and (2) to the execution of repairs on the demised premises, but were not considered sufficient to give rise to an inference of surrender "by operation of law" of the former lease. "All that is proved is that the rent was paid, but that alone cannot justify the inference that the persons remitting it were accepted and treated by the plaintiffs as their tenants. *Laurence v. Furx*, 2 F. & F. 435, cited by Mr. Blackstock, is distinguishable. There, a receipt for rent was in fact proved, and was held to be evidence of the surrender by operation of law of a former tenancy. But it was on its face expressed to be for money

(*l*) See *Dove v. Dove*, 18 U. C. C. P. 424 (1868).

(*m*) The learned judge suggests that it may be supported as an assignment of a chose in action, citing *Ex. p. Hall*, 10 Ch. D. 615 (1879); *Re Haisley*, 44 U. C. R. 345 (1879).

(*n*) See *Doe d. Burr v. Denison*, 8 U. C. R. 185 (1851). As to surrender by "operation of law," see *Lyon v. Reed*, 13 M. & W. 305 (1844); *Thomas v. Cook*, 2 B. & Ald. 119 (1818); *Walker v. Richardson*, 2 M. & W. 882 (1837).

(*o*) 14 A. R. 209 (1886).

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paid as rent due by the person paying it as a tenant of the premises; and the case was thus brought within the rule of *Thomas v. Cook*, 2 B. & Ald. 119" (p).

9. A contingent, an executory, and a future interest, and a possibility coupled with an interest in land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, or whether vested or contingent, into or upon land, may be disposed of by deed; but no such disposition shall by force only of this Act defeat or enlarge an estate tail: R. S. O. 1877, c. 98, s. 5; 47 V. c. 19, s. 22.

Certain interests in land may be disposed of by deed.

*Nature of interests enumerated in this section:—*

The four phrases: (1) *a contingent interest*; (2) *an executory interest*; (3) *a future interest*; and (4) *a possibility coupled with an interest*, are used in this section with the evident intention of covering all of certain closely similar interests in land. Each of these four phrases can be used as in a measure inclusive of the others. Thus Fearné distinguishes estates *contingent* as including "*contingent* remainders, and such *Executory* Devises, *Future* Uses, *Conditional Limitations* and other future interests as are referred to, or made to depend on, an event that is uncer-

(p) *Ib. per Osler, J.A.* For other cases as to surrender by operation of law, see *Ferguson v. Troop*, 17 S. C. R. 527 (1889); *Nixon v. Maltby*, 7 A. R. 371 (1882); *Dainty v. Vidal*, 13 A. R. 47 (1886); *Acheson v. McMurray*, 41 U. C. R. 484 (1877); *Ramsay v. Stafford*, 28 U. C. C. P. 229 (1877); *Wheeldon v. Milligan*, 44 U. C. R. 174 (1879); *Pronguey v. Gurney*, 37 U. C. R. 347 (1875); increase or reduction of rent; *Crocker v. Sowden*, 33 U. C. R. 397 (1874); surrender by wife during husband's imprisonment; *Kyle v. Stocks*, 31 U. C. R. 47 (1871); new lease of portion of premises without apportionment as to remainder; *Carpenter v. Hull*, 16 U. C. C. P. 90 (1866), giving up key; *Coffin v. Danard*, 24 U. C. R. 267 (1865), right of possession in lessor; *Regina ex rel Adamson v. Boyd*, 4 P. R. 204 (1868), fresh lease to new partnership; *Caverhill v. Orvis*, 12 U. C. C. P. 392 (1862), third parties; *Elsworth v. Brice*, 18 U. C. R. 441 (1859), absence of lessee; *Horton v. Macconichy*, 9 U. C. C. P. 186 (1859), substitution of demised lands for others; *Grant v. Lynch*, 6 U. C. C. P. 178, 14 U. C. R. 148 (1857), new agreement not executed; *M'Leod v. Darch*, 7 U. C. C. P. 35 (1857), receipts for rent; *O'Dougherty v. Fretwell*, 11 U. C. R. 65 (1853), bond not a deed as required by statute; *Lewis v. Brooks*, 8 U. C. R. 576 (1852), new lease from transferee of reversion; *Doe d. Burr v. Denison*, 8 U. C. R. 185 (1851), giving up and cancelling lease by tenant; *Russell v. Graham*, 6 U. C. R. 497 (1850), surrender by third party; *McNeil v. Train*, 5 U. C. R. 91 (1848), surrender by operation of law should be pleaded; *Doe d. McPherson v. Hunter*, 4 U. C. R. 449 (1848), fraudulent conveyance by lessor to lessee; *Strathy v. Crooks*, 1 U. C. R. 44 (1844), surrender by operation, etc., is a matter of law; *Strathy v. Crooks*, 6 O. S. 587 (1843), new demise; *Doe d. McDonell v. McDougall*, 3 O. S. 177 (1834), surrender to Crown.

tain" (q). There are, however, certain narrower uses of the first two of these phrases which serve to mark valuable distinctions. Thus contingent estates are said to be capable, and executory estates are said to be incapable, of being limited *under the rules of the common law* (r), a distinction that draws with it a certain liability of contingent estates to destruction; from which liability executory estates are free.

"*Future interest*" may include both "contingent" and "executory"; e.g., in the phrase "estate or interest in reversion or remainder or other future estate or interest" (s), the words italicized comprehend all executory devises (t). A future interest need not be contingent.

*Possibilities*.—The word "*possibility*," according to Challis, has been obscured by its confused usages. He distinguishes three kinds, (i) possibilities coupled with an interest; (ii) bare possibilities; (iii) absolutely bare possibilities. Of the first kind, that mentioned in our present section, he says:—" (i) Possibilities coupled with an interest; as contingent remainders and executory interests; which, as soon as the person in whom they will vest, if they do vest, is ascertained, are both descendible and deviseable" (u).

Of all the four phrases mentioned in the present section, the connecting thread is the "contingency" of the interest: "an interest is *contingent*, where a right of enjoyment is to accrue on an event which is dubious and uncertain, e.g., if A. convey land to C. for life, and if D. die in the lifetime of C., then, after C.'s decease, to B. and his heirs, the interest limited to B. is contingent" (v).

(q) *Fearne on Contingent Remainders*, 10th ed. p. 1.

(r) *See Challis on Real Property*, 57.

(s) R. S. O. 1887, c. 111, s. 5 (11); 3 & 4 Wm. IV. c. 27, s. 3.

(t) *Per Tindal, C.J., James v. Salter*, 3 Bing. N. C. 554.

(u) *Challis on Real Property*, 58.

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*Former modes of assigning such interests:*—To assign such interests as we are here dealing with, there were, before the passing of the present section (*w*), several possible modes. A possibility coupled with an interest had been held devisable, *i.e.*, transmissible by will (*x*). A contingent remainder could be alienated by "fine," *i.e.*, a fictitious action at law. The fine "operated in the first instance during the contingency by estoppel; and on the happening of the contingent event, the estate which then became vested fed the estoppel" (*y*). Such interests might also be released to the owner of the land, but not to a stranger (*z*).

"Executory interests, in persons in being and ascertained, are assignable in equity, for valuable consideration; . . . when it said that executory interests are assignable in equity, it is meant that an assignment of them is treated by a Court of Equity as a contract or agreement of which it will decree a specific performance" (*a*).

*Formerly not assignable inter vivos:*—But at common law these interests being only possibilities were not assignable *inter vivos* (*b*). The present section is meant to remedy this state of the law by rendering them assignable by deed.

"Whether the object of the gift or limitation of such interest or possibility be or be not ascertained":—It was perhaps true that in equity this was already the case. Thus where there was a devise to such of the children of A. as should be living at his death, and A. had issue, B.,

(*w*) It is taken from 8 & 9 V. c. 106 (Imp.), s. 6; first enacted in Canada 14, 15 V. c. 7, s. 5.

(*x*) Jones v. Roe, 3 T. R. 88 (1789).

(*y*) Burton on Real Property, 8th ed. p. 22, note (a).

(*z*) Fearn, 10th ed. by Josiah Smith, Vol. II. s. 751. As to alienation of interest of a yearly tenant, see Allcock v. Moorehouse, 9 Q. B. D. 371 (1882).

(*a*) *Ib.* s. 749.

(*b*) Challis, p. 58.

who becoming a bankrupt, got his certificate of discharge, after which A. died; in that case the contingent interest of B. (who, of course, could not be ascertained as the object of the gift or limitation during A.'s lifetime) was held liable to the assignment in bankruptcy (c). The present section leaves no doubt about the matter.

*"Also a right of entry":*—This enactment does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a disseisin or where the party has a right to recover lands, and has right of entry and nothing but that remains (d). In other words, not a right of entry for a forfeiture, e.g., on account of failure to pay rent or to repair or to build according to covenant, *but a right of entry in the nature of an estate or interest*, that is where a person by lapse of time has lost everything except his right of entry (e). Both at common law and by the statute 32 Hen. VIII., c. 9, a conveyance of such an estate or interest was void; "and the reason hereof is for avoiding of maintenance, suppression of right and stirring up of suits" (f).

*"Disposed of":*—These words also occur in an Act passed in the same year in which this section was first enacted, i.e., The Land Clauses Consolidation Act, 1845 (g), and have there been held to signify a transfer to some other person (h). The words are commonly in use without having any very definite conveyancing value, e.g., in the

(c) *Higden v. Williamson*, 3 P. Wms. 132 (1731); but see *Pope v. Whitcombe*, 3 Russ. 124 (1826).

(d) *Hunt v. Bishop*, 8 Exch. at p. 680 (1853).

(e) *Hunt v. Remnant*, 9 Exch. at p. 640 (1854); *Bennett v. Herring* 3 C. B. N. S. 369 (1857); *Jenkins v. Jones*, 9 Q. B. D. 131 (1882).

(f) See *Doe d. Williams v. Evans*, 1 C. B. 717 (1845). See, as to onus of proof, *Kennedy v. Lyell*, 15 Q. B. D. 491 (1885).

(g) 8 and 9 V. c. 118 (Imp.) ss. 127, 128.

(h) *Astley v. Manchester*, 2 De G. & J. 453 (1858). See also, *Re Thackway & Young*, L. R. 40 Ch. D. 34 (1889).

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case cited above of *Jones v. Roe* (i), Lord Kenyon, C.J., uses the same words, "dispose of" and "disposition."

"But no such disposition, etc."—Cf. R. S. O. 1887, c. 103, s. 8. "Nothing in this Act contained shall enable any person to dispose of any lands entailed, in respect to any expectant interest which he may have as issue inheritable to any estate tail therein."

10. Neither of the words "grant" or "exchange," in any deed, shall create any warranty or right of re-entry, or covenant by implication except in cases where, by any Act in force in Ontario, it is declared that the word "grant" shall have such effect. R. S. O. 1877, c. 98, s. 6.

No implied warranty, etc., to be created by the word "grant" or "exchange."

This section is taken from 8 & 9 V. c. 106 (Imp.), s. 4 (j).

*Covenant*:—"A covenant is the agreement or consent of two or more by deed in writing, sealed and delivered, whereby either or one of the parties doth promise to the other, that something is done already, or shall be done afterwards" (k).

*Warranty*:—"A warranty is a covenant real, annexed to lands and tenements, whereby a man and his heirs are bound to warrant the same" (l), "and either upon voucher, or by judgment in a writ of *warrantia chartæ* to yield other lands and tenements to the value of those that shall be evicted by a former title" (m). The following notes occur in the 8th ed. of the Touchstone:

"In the practice of modern conveyancers, warranties are but rarely, if ever, made use of:—Covenants may be said to have entirely superseded these; for a covenant, when the covenantor covenants for his heirs, binding the

(i) 3 T. R. 88 (1789).

(j) First enacted in Can. 12 V. c. 71, s. 6.

(k) Touch. 160.

(l) *Ib.* 181.

(m) Co. Litt. 365a.

heirs where they have assets by descent, and also binding the covenantor's personal representatives, and consequently rendering his personal assets liable in case of a breach of the covenant (and they are not liable in the case of a warranty), and being more easily adapted to the circumstances of many cases which arise than a warranty; a covenant may be said to have most of the advantages of a warranty and also some advantages which a warranty does not possess. In consequence, therefore, of the disuse of warranties, the learning on the subject is of much less importance than formerly" (n).

*What implied by grant*:—"It was one time a prevailing opinion that the word *grant* in any conveyance created a warranty and in consequence of such opinion trustees were advised not to convey by the word *grant*, but it now seems to be agreed that this word, when used in a conveyance of an estate of inheritance, does not imply a warranty" (o).

"But it is said the word *grant* of itself imports a covenant; which it does at law; but that is where there is no particular covenant" (p).

Dart says of the present section:—"The object of this enactment appears to have been to prevent any *general* warranty of title from arising by the use of the words "give" and "grant"; and it probably would not be held to interfere with the rule of law that any words of assurance operate as a covenant for quiet enjoyment of the interest expressed to be assured as against the future acts of the party making the assurance" (q).

Dart, in the same passage, also explains the exceptions referred to in the present section:—"Under the 6 Anne,

(n) Touch. 181.

(o) *Ib.* 183.

(p) *Clarke v. Samson*, 1 Ves. (Sen.), 100 (1748).

(q) Citing *Seddon v. Senate*, 13 East, 74 (1810), as to the word "assigns."

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(u) Touch. p.



c. 35, ss. 30 & 34, and 8 Geo. II. c. 6, s. 35 the words 'grant, bargain and sell,' in bargains and sales of hereditaments in Yorkshire, enrolled according to those Acts, have the effect of the usual covenants for title in favour of a purchaser, and this, of course, falls within the exception in the 8 & 9 V. c. 106. So, in a conveyance under the Lands Clause Consolidation Act, 1845 (*r*), by the promoters of the undertaking, the word 'grant' is to operate as covenants for title, unless limited by express words contained in the conveyance; so, in a conveyance by a public company under the Joint Stock Companies Act (*s*), the ordinary covenants for title are to be implied, unless such implication is expressly negatived" (*t*).

*Exchange*:—"And if the exchange be of lands or tenements of any estate of inheritance or freehold, whether it be by word or deed, it hath a condition and a warranty in law incident and annexed to it, as a thing made by the word "exchange," and *tacite* implied in every grant of exchange; a condition to give a re-entry upon all the land given in exchange, if he be put out of all or part of the land taken in exchange; and a warranty, to enable him to vouch, and to recover over in value so much of his own land again given in exchange, as shall be recovered from him of the land taken in exchange, if he be sued for it; so that upon every exchange, either party, if he be put out of or lose by action, the land he taketh in exchange, hath a double remedy against the other" (*u*).

*Peculiarities of Exchange*:—"The word 'convey' has not the legal technical meaning assigned to the word 'exchange.' The definition of an 'exchange' of lands has not been altered, though there is an enactment that an exchange shall not imply any condition in law. According

(*r*) 8 & 9 V. c. 18 (Imp.), s. 132.

(*s*) 19 & 20 V. c. 46 (Imp.) s. 46. Repealed by Companies Act, 1862.

(*t*) Vendors and Purchasers, 5th ed. 562.

(*u*) Touch. p. 290.



to the old authorities, no other word can be substituted for 'exchange,' in order to give the peculiar operation belonging to such a mode of conveyance, nor will any averment supply the want of it. In *Towsley v. Smith*, 12 U. C. R. 558, many of the leading authorities are collected. I refer also to *Eton College v. Winchester*, 3 Wils. 468" (v).

A precedent of common law exchange is given in Hayes' Introduction to Conveyancing (w), with the following note of explanation and warning:—"This being an exchange at the common law, it is requisite that the exchanging parties should be upon a footing of equality in point of estate, and that the transaction should be completed by actual entry. But as well conveyances requiring livery, as conveyances requiring entry, have fallen into disuse. The modern lease and release has superseded them all. Exchanges are now commonly effected by mutual conveyances, adapted to pass the land without entry. Such conveyances are valid without regard to the requisites of a common law exchange; for property of any given kind may be *bartered* for property of the same or any other kind, and the bargain may be completed by adopting the modes of assurance suitable to the transfer of the respective properties. Unless the relative condition of the parties, the subject-matter, and the form of assurance, are in accordance with an exchange strictly at the common law, the incidents of such an exchange cannot belong to the transaction (x). In every case, the better course appears to be, to proceed upon the basis of a reciprocal sale—the condition being *land* instead of money—and for each party to investigate the other's title, as upon a purchase, in order that mutual conveyances may be executed in the ordinary form, with the usual qualified covenants for title. Each title will thus be independent of the other; whereas, a vendor, deriving his

(v) *Draper, C.J.*, in *Leach v. Dennis*, 24 U. C. R. 131 (1864).

(w) 5th ed. Vol. II. p. 10.

(x) Citing *Bartram v. Whichcote*, 6 Sim. 86 (1833).

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title under a proper *exchange* made within sixty years, is obliged to show the title to both estates; unless, indeed, he can prove that the *fee* of the lands exchanged *away* has since been aliened, for the implied right of re-entry does not pass to an alienee."

11. The preceding three sections of this Act shall not extend to any deed, act or thing executed or done, or to any estate, right or interest created before the 1st day of January, 1850, but they shall extend to and have operation and effect on and from that day. R. S. O. 1877, c. 98, s. 7.

Preceding three sections not to extend to deeds, etc., executed before 1st Jan. 1850.

1st day of January, 1850:—12 V. c. 71 (Can.), took effect from and after 31st December, 1849. See s. 14 thereof.

12 (1) Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands therein comprised, belonging or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances.

Conveyance to include all houses, etc., and the reversion, and all the estate, etc.

(2) Except as to conveyances under the former Acts relating to short forms of conveyances, this section applies only to conveyances made after the 1st day of July, 1886. R. S. O. 1877, c. 102, s. 4; 49 V. c. 20, s. 5.

The 1st sub-section is the same as section 4 in the Act respecting Short Forms of Conveyances (*y*).

(*y*) R. S. O. 1887, c. 105, s. 4; also, c. 107, s. 4. See notes to s. 1 (6) *supra*.

As "conveyance" includes lease this section likewise covers the same ground as the 3rd section of the Act respecting Short Forms of Leases (z).

The 1st day of July, 1886, is the date of taking effect of 49 V. c. 20 (3) (a). The 6th section of the Imperial Act (b), from which said Act has been taken, has elaborate clauses as to what a conveyance includes; but there being already in use in this country the clause in the Short Forms Act, our Legislature has retained the same.

*Houses*:—See *Messuages*, under s. 1 (1), *supra* (c). Besides its conveyancing meaning, house is often used in the sense of "building." See Stroud's Judicial Dictionary, 257; Anderson's Dictionary of Law, 515, and cases cited there. For meaning of "building," see *Regina v. Labadie* (d); *Carr v. Fire Assurance Association* (e); *Mitchell v. City of London Fire Insurance Co.* (f). For "dwelling," see *Gouinlock v. Manufacturers and Merchants Mutual Insurance Co.* (g).

"Mill" does not include the fee in the soil under the millstream and dam: *Green v. Green* (h).

"Outhouses":—"Buildings belonging to and adjoining dwelling houses (i).

"Edifices":—See "Building," *supra*.

"Burns, stables":—The decisions on the usage of the word "barn" have more to do with the criminal law than

(z) R. S. O. 1887, c. 106, s. 3.

(a) Section 2.

(b) 44 & 45 V. c. 41.

(c) See also *St. Thomas Hospital v. Charing Cross Ry.*, 1 J. & H. 404 (1861); *Touch. 90*; Stroud's Judicial Dictionary, 257.

(d) 32 U. C. R. 429 (1872); case of arson.

(e) 14 O. R. 487 (1887).

(f) 12 O. R. 706 (1883).

(g) 43 U. C. R. 563 (1878).

(h) 2 P. E. I. 8 (1874).

(i) Wharton's Law Lexicon, 7th ed. 583

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(n) 5 R. & C. 8

with that of real property: "And if the *barn*, stable or warehouse, be parcel of the mansion-house and within the same common fence, though not under the same roof, or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or house-stall" (j).

*Yards*:—Under this word, where the parcels were described with reference to coloured parts of a plan, a yard, delineated but not coloured in the plan, was held to pass (k).

*"Gardens"*:—A distinction was made in *Rex. v. Hodges* (l), between a "garden" and a "nursery ground," which the jury took advantage of to acquit a prisoner.

*"Orchards"*:—See "messuages" under s. 1 (1), *supra*.

*"Commons"*:—"The word 'commons' means as often lands where rights of common are exercised, as common unenclosed open land when there are no commonable rights" (m).

*"Trees"*:—Some fine distinctions have been drawn as to the meaning of 'trees.' Thus, in *Bullen v. Denning* (n), where Littledale, J., said:—"The word *trees*, generally speaking, means wood applicable to buildings, and does not include orchard trees"; it was held that "timber trees and other trees" did not include fruit-trees.

"And in cases where the trees only do pass, and where the grant is of all a man's trees, there shall pass no more of the soil, but so much as shall serve for the nutriment of

(j) Blackstone, 4 Com. 225; see also *State v. Smith*, 28 Iowa, 568 (1870), and *Ratekin v. State*, 20 Ohio St. 420 (1875), as to what the "barn" may be used to store.

(k) *Willis v. Watney*, 51 L. J. Ch. 181 (1881).

(l) *Moo. & Mal.* 341 (1829). See further *Ex. p. Hammond*, 9 Jur. 358 (1845); *Purser v. Worthing*, 18 Q. B. D. 818 (1886).

(m) *Atty.-Gen. v. Hammer*, 27 L. J. Ch. 841 (1857). For the various sorts of commons, see *Co. Litt.* 122a.

(n) 5 B. & C. 842 (1826).

the trees, and the owner of the soil shall have the grass growing thereupon also" (o).

*Woods*:—"A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods; not only the woods growing upon the land pass, but the land itself" (p). "In like manner, by an exception in a lease of the woods and underwoods growing or being on the property demised, the soil itself on which they grow is excepted: *Ives' Case*, 5 Rep. 11a; *Hide v. Whistler*, Pop. 146; *Whistler v. Paston*, Cro. Jac. 487. On the other hand, by an exception of 'trees,' *Liford's Case*, 11 Rep. 46b, or 'saleable underwoods' now growing on the premises; *Pincombe v. Thomas*, Cro. Jac. 524, the soil itself is not excepted. See *Glover v. Andrew*, 1 And. 7" (q).

*Underwoods*:—"Generally speaking, that term is applied to a species of wood which grows expeditiously, and sends up many shoots from one stool, the root remaining perfect from which the shoots are cut, and producing new shoots and so yielding a succession of profits" (r).

*Fence*:—"A line of obstacle, composed of any material that will present the desired obstruction" (s).

*Ditches*:—See R. S. O. 1887, c. 220.

*Ways*:—"A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground" (t).

(o) Touch. 95. See further, *Stanley v. White*, 14 East, 332 (1811).

(p) Co. Litt. 4a. See *Doe d. Kingslake v. Revias*, 7 C. B. 456 (1840).

(q) *Elphinstone on Deeds* 613.

(r) *Bayley, J.*, in *King v. Ferrybridge*, 1 B. & C. 383 (1823).

(s) *Anderson's Dictionary of Law* 454; *Allen v. Tobias*, 77 Ill. 171 (1875). See also R. S. O. 1887, c. 219.

(t) 2 Bl. Com. 35. For scope of word, see *Barkshire v. Grubb*, 18 Ch. D. 616 (1891); *Brown v. Alabaster*, 37 Ch. D. 490 (1887), and cases there cited. See also "Way," in *Stroud's Judicial Dictionary* 875.

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(a) *Anderson*  
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*Waters, water-courses*.—If a man grant *aquam suam* the soil shall not pass but the piscary within the water passeth therewith" (u).

*Lights*.—"On the other hand, when a house is sold 'with all its lights' a statement in the particulars that adjoining land, belonging to the vendor, is building land, does not authorize the vendor, or a purchaser from him to build upon the adjoining land, so as to obstruct such lights" (v).

*Liberties*.—"With all liberties": see *Heddy v. Wheelhouse* (w); *Penryn v. Best* (x).

*Privileges; easements*.—"As was said by Lord Wensleydale in the case of *Rowbotham v. Wilson* (y), "it is one of the cases put by *Sheppard's Touchstone* in illustration of the maxim, '*quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' that by a grant of mines, is granted the power to dig them." This power to dig would of course be futile unless it involved the right of bringing to the surface. A necessary incident to a grant cannot, therefore, in my opinion, be styled a "privilege, servitude or easement" (z).

*Profits*.—*Profits a prendre*, a right to the products or proceeds of land (a).

(u) Co. Litt. 4b. See further, *Sanderson v. Berwick-upon-Tweed*, 13 Q. B. D. 547 (1883); *Wardle v. Brocklehurst*, 29 L. J. Q. B. 145 (1859). Also *Woodfall on Landlord and Tenant*, 13th ed. c. 18, s. 4; also R. S. O. 1887, c. 220.

(v) Dart, V. & P. 5th ed. 122, 6th ed. 136. Citing *Swansborough v. Coventry*, 19 Bing. 305; *Booth v. Alcock*, L. R. 8 Ch. 667.

(w) Cro. Eliz. 591.

(x) L. R. 3 Ex. D. 292 (1878).

(y) 8 H. L. C. 360.

(z) Lord Chelmsford, in *Ramsay v. Blair*, L. R. 1 App. Ca. 703 (1876); for cases on the similar section in the Imperial Conveyancing Act, 1881, see *Birmingham Banking Co. v. Ross*, 38 Ch. D. 307 (1888), cases where no expectation of easement continuing; *Beddington v. Atlee*, 35 Ch. D. 331 (1887), danger of express mention of "appurtenances."

(a) *Anderson's Dictionary of Law*. For distinction between easements and profits, see *Goddard's Law of Easements*, Am. ed. 7; *Gale on Easements*, 4th ed. 1, 7; *Hall on Profits a Prendre*.

H. R. F. S.—4

*Commodities, Emoluments*:—"Commodities, Emoluments, Profits and Advantages . . . all of which four words are of one sense and nature, implying things gainful" (b).

"*Appurtenances*," "*used or enjoyed with*," *what passes under these words?*—In *McNish v. Munroe* (c), a disputed strip of land, claimed as part of lot 25 had been enclosed by a fence and used as a part of lot 26. A deed was made to the defendant of lot 26, "together with all and singular the houses, out-houses, etc.," "easements . . . hereditaments and appurtenances whatsoever to the said parcel or tract of land and premises belonging, or in anywise appertaining, or therewith demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof." Patterson, J., said: "The proposition is, that this part of lot 25 passed as included in the description 'lot 26,' or as hereditament demised, held, used, occupied, and enjoyed with lot 26, or taken or known as part or parcel thereof. It could not pass as appurtenant or appendant to lot 26, both being corporeal hereditaments, and this is not contended. It was not used, occupied or enjoyed with lot 26 in the sense in which a garden or a stable is used, occupied or enjoyed with a mansion house. It was not taken or known as part of 26, for any mistake on that score had been corrected by the survey of 1854. If the land had been conveyed by a description such as 'my farm, called lot 26,' it is not impossible that a question might have been raised as to its being included in the farm improperly called lot 26 (d).

"The effect of words such as 'used or enjoyed with,' as even in the case of easements, passing rights which would not have passed as appurtenances, is noticed in the most

(b) *London v. Southwell*, Hob. 304.

(c) 25 U. C. C. P. 290 (1875).

(d) Citing *Lister v. Pickford*, 34 Beav. at p. 580 (1864).

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(e) 40 U. C. R  
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(f) 34 Beav. 5

(g) 51 L. J. Ch

(h) 5th ed. 737.



recent case which I have seen, namely, *Kay v. Oxley*, L. R. 10 Q. B. 360. But I have seen no authority which, in my opinion, goes the length necessary to maintain the defendant's proposition. That proposition, if law, would seem to lead to results that would surprise owners of land in this country."

The same judge, in *Harris v. Smith* (e), held that a right of way is not such a continuous easement as to pass by implication of law with a grant of the land; only a way of necessity will so pass. And that a way used by the owner of two tenements over one for access to the other, is not in law appurtenant to the dominant tenement, so as to pass with a grant of it under the word "appurtenances," unless the deed shows an intention to extend the meaning of that word, and to embrace the way; or the grant is of all ways "used and enjoyed"; or words are used shewing an intention to include existing ways, in which case a defined existing way will pass.

*Appurtenances*.:—On the question whether "land can be appurtenant to land," see *Lister v. Pickford* (f); *Cuthbert v. Robinson* (g); *Jarman on Wills* (h).

13. Any corporation aggregate in Ontario, capable of taking and conveying land, shall be deemed to have been and to be capable of taking and conveying land by deed of bargain and sale, in like manner as any person in his natural capacity, subject nevertheless to any general limitations or restrictions and to any special provisions as to holding or conveying real estate which may be applicable to such corporation. R. S. O. 1877, c. 98, s. 8.

Corporations aggregate may convey by bargain and sale.

This section is originally found in 4 Wm. IV. c. 1 (U.C.), s. 46. The words in the last line but one, "and to any special provisions," did not, however, occur in the original section, but are found in C. S. U. C. c. 90, s. 13.

(e) 40 U. C. R. 33 (1877). This case is a very useful one, from the number of authorities cited by all the judges taking part in the proceedings.

(f) 34 Beav. 376 (1864).

(g) 51 L. J. Ch. 238 (1831).

(h) 5th ed. 737.



The nature of the mischief at which this present enactment was aimed will appear from the following passage :—

“It was once thought that a corporation could not stand seised to a use; and hence, as a deed of bargain and sale merely passes the use, and the bargainor must stand seised of the land for a moment, that the statute of uses, if we may be allowed the expression, may have time to execute the use, it was thought that a corporation could not make a deed of bargain and sale. Lord Chief Baron Comyn, indeed, says, that a corporation may bargain and sell, for they may give a use, though they cannot stand seised to one; and founds himself upon a case, where it appeared that the prioress of Hallowell conveyed certain lands by the words *dedi et concessi pro certa pecunie summa* to Lord Chancellor Audley and his heirs. It was objected, that a bargain and sale by a corporation was not good, for it could not be seised to another's use. But the court rejected the objection as dangerous; for that such were the conveyances of the greater part of the possessions of monasteries. And it was said, that although such a corporation could not take an estate to another's use, yet they might charge their possessions with a use to another. The only principle, however, upon which this case can be supported, that lands may be charged with an use, as with a rent or common, was rejected as an absurdity in Chudleigh's case; and Mr. Cruise, in his learned and valuable Digest, informs us that in England, ‘it is now generally admitted that a corporation cannot stand seised to an use,’ with a view to prove that it was incapable of making a deed of bargain and sale” (i).

Enrolment  
or registra-  
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to validity.

14. No deed of bargain and sale of land in Ontario, executed subsequently to the 6th day of March, 1834, shall require enrolment or registration to supply the place of enrolment, for the mere purpose of rendering such bargain and sale a valid and

(i) Angell & Ames on Corporations, 4th ed. s. 220.

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effectual conveyance for passing the land thereby intended to be bargained and sold, but this shall not affect any question of priority under *The Registry Act*, or any Act heretofore in force respecting the registration of instruments relating to real estate. R. S. O. 1877, c. 98, s. 9.

of deeds of bargain and sale. This shall not affect priority under R. S. c. 114.

This section appears to have been suggested by the Imperial Act, 3 & 4 Wm. IV. c. 74, s. 10.

"No common recovery already suffered, or hereafter to be suffered, shall be invalid in consequence of the neglect to enrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled."

The present section itself was first enacted in Upper Canada on the 6th March, 1834, in the following form:—

"That after the passing of this Act, a deed of bargain and sale of land in this province shall not be held to require enrolment or to require registration to supply the place of enrolment for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold; Provided always, nevertheless, that the necessity of registering such deed of bargain and sale in the register of the county in which the land is situated, in order to guard against a subsequent purchaser of the same lands obtaining title by prior registry, shall continue as before the passing of this Act" (j).

The proviso has been unprofitably condensed in the later revisions, but the meaning is still evidently the same.

Formerly, in Upper Canada, a bargain and sale required two enrolments or registrations.

(j) 4 Wm. IV. c. 1, s. 47.

I. In the registry office for deeds, in order to preserve its priority; the necessity for which registry is untouched by the present enactment.

II. Under the Statute of Enrolments (*k*). That statute required a bargain and sale (in order to be valid) to "be made by writing, indented, sealed and enrolled in one of the King's courts of record at Westminster . . . the same enrolment to be had and made within six months next after the date of the same writing indicated."

In 1797 we find an enactment of our province (*l*), with the following instructive preamble:—"Whereas in certain cases lands have been intended to have been conveyed by deed of bargain and sale, and whereas such deeds of bargain and sale not having been enrolled in a court of record are not valid in law; in order therefore to prevent the injury that might hence arise to His Majesty's subjects in this province, and for the better regulating the conveyance of land in future, be it enacted, etc." The substance of the enactment was that whenever any lands have been or shall be sold by bargain and sale, and such deed has been registered in the proper registry office, the same is thereby declared a good and valid conveyance in law.

The third stage was the above Act of 4 Wm. IV., removing the necessity for enrolment altogether. 4 Wm. IV. c. 1, s. 47, was held to be retrospective, so as to make deeds of bargain and sale, executed before the Act, valid without registration.

The same case held that a deed poll was sufficient, an indenture being no longer essential (*m*).

(*k*) 27 Hen. VIII. c. 16.

(*l*) 37 Geo. III. c. 8.

(*m*) *Rogers v. Barnum*, 5 O. S. 252 (1836); see *Doe d. Spafford v. Brown* 3 O. S. 92 (1833). In New Brunswick, a deed of bargain and sale not enrolled according to 27 Henry VIII. c. 16, or 26 Geo. III. c. 3, does not pass any estate; *Doe d. Hanington v. McFadden*, Bert. 153 (1836).

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15. (1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court—in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land—of such amount as, when invested in securities approved by the Court, the Court considers will be sufficient by means of the dividends thereof to keep down or otherwise provide for that charge; and—in any other case of capital money charged on the land—of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons thinks fit to require a larger additional amount.

(2) Thereupon the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance; and make any order for conveyance, or vesting order, proper for giving effect to the sale; and give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof. 49 V. c. 20, s. 12 (1-3).

16. (1) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(2) Every application to the Court shall, except where it is otherwise expressed, be made in chambers, and on notice.

(3) On an application by a purchaser, notice shall be served in the first instance on the vendor.

(4) On an application by a vendor, notice shall be served in the first instance on the purchaser.

(5) On any application, notice shall be served on such persons as the Court thinks fit.

(6) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges or expenses of all or any of the parties to any application. 49 V. c. 20, s. 19.

Provision  
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free from  
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ces. Imp.  
Act, s. 5.

Regulations  
respecting  
payments  
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cations.  
Imp. Act,  
s. 69.

The effect of these sections will be better manifested by a concrete instance (n) :—

A mortgage deed gave the mortgagee (Mowatt) an option to purchase, in case the debt was not paid on a day named. The trustees in bankruptcy of the mortgagors sold the mortgaged property to the Milford Haven Co. A part of the purchase money was deposited to provide against the mortgage. Pending proceedings on the part of trustees to set aside the mortgage on the ground of fraudulent preference, an order was made that the money deposited should be paid into court, and on such further sum being paid as would cover the principal and interest due, and ten per cent. extra, the mortgaged property should vest in the purchaser.

Pearson, J. : "Under those circumstances I think the Milford Haven Co. are entitled to be absolutely protected, and I do not hesitate to say that, in my opinion, if the Conveyancing and Law of Property Act, 1881, had never been passed, this court would have protected the Milford Haven Co. in such a case from being injured in any way whatever by an attempt on the part of Mr. Mowatt to exercise his option as against them in consequence of litigation between him and the trustees in bankruptcy of Messrs. Lake & Taylor. But the Conveyancing and Law of Property Act, 1881, contains certain provisions which, I think, may be usefully applied on the present occasion. The Act (s. 5, s-s. 1), provides that where any land has been sold out of court, in the case of capital monies charged to it, the court may, upon the payment into court of the amount sufficient to meet the incumbrance and any interest due thereon, and of such additional amount as the court considers to be sufficient to meet the contingency of further costs, expenses and interest, not exceeding one-tenth part of the original amount, order the money to be paid into

(n) Milford Haven v. Mowatt, L. R. 28 Ch. D. 402 (1884).

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court, and then (s-s. 2), if it think fit, 'declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court': I propose, therefore, to proceed under this Act, and in your action also, Mr. Hardy, and I propose to direct the persons in whose names that £6,500 is deposited to pay this £6,500 into court, and if it appear that more money will be necessary in order to make up the ten per cent. which I think ought to be paid in, I suppose, Mr Hardy, you will undertake to pay that in."

Cozens-Hardy, Q.C.: "Yes; will your lordship to save expense make a vesting order, and also restrain the defendant Mowatt from exercising his option during the few days that must elapse till the money is paid in?"

Pearson, J.: "Yes, vest the property in your clients for all the estate and interest of Mr. Mowatt and the trustees in bankruptcy, and direct the money to be carried to a new account of the mortgage of the 15th December, 1882, between Messrs Lake and Taylor and Mr. Mowatt in dispute in the action of *Spain v. Mowatt*. That I think will be ear-marking it sufficiently. I direct the dividends to be received and accumulated until further order with liberty to any parties interested to apply. I will restrain Mr. Mowatt from acting on his option in the meantime."

17. (1) In a conveyance made on or after the 1st day of July, 1886, there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the person jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

- (a) In a conveyance for valuable consideration, other than a mortgage, the following covenants by the person

Covenants to be implied.  
Imp. Act,  
44-45 V. c.  
41, s. 7.

On conveyance for

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beneficial  
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Imp. Act,  
s. 7.

R. S. c. 105.

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Imp. Act,  
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who conveys, and is expressed to convey, as beneficial owner, namely :

Covenants for right to convey ;  
Quiet enjoyment ;  
Freedom from incumbrances ; and  
Further assurance ;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to *The Act respecting Short Forms of Conveyances*, and therein numbered 2, 3, 4 and 5, respectively, subject to the directions in the said schedule contained.

(b) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant, by the person who conveys, and is expressed to convey, as beneficial owner, namely :

That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by and all the covenants, conditions and agreements contained in the lease or grant and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed, up to the time of conveyance. 49 V. c. 20, s. 13 (1a, b).

(c) In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, which covenant shall be deemed to extend to every such person's own act only, namely :

That the person so conveying has not executed, or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof is, or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in any wise hindered from conveying the subject-matter of the conveyance or any part thereof, in the manner in which it is expressed to be conveyed. 49 V. c. 20, s. 13 (1f).

(5) Where a person conveys, or conveys and is to be deemed a beneficial owner and a covenant

(3) Where a person is expressed to convey or as mortgagee, or as co-owner, or as order of the owner, no shall be by virtue

(4) The benefit annexed and included of the implied covenant by every person or any part thereof

(5) A covenant intended by deed, may be, operates incidents, effects extensions were 49 V. c. 20, s. 13 (2-5).

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2, s. 5, *infra*.

(p) L. N. & W.

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(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey, and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

On conveyance by beneficial owner.

(3) Where in a conveyance, a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be by virtue of this section implied in the conveyance.

Where covenants not implied.

(4) The benefit of a covenant, implied as aforesaid, shall be annexed and incident to and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

Enforcing covenants.

(5) A covenant implied as aforesaid, may be varied or extended by deed, and as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied. 49 V. c. 20, s. 13 (2-5).

Variation of covenants.

*Beneficial owner*:—In *McEwen v. Boulton* (o), the expression “owner in fee” was held to mean the beneficial owner.

The covenants included by this section are *express* and *not implied* covenants (p).

Where on a sale of freeholds, sub-leases were made by a tenant of the vendor who had surrendered his lease previously to the sale, these were held not breaches of the covenants by beneficial owner (q).

(o) 2 Chv. D. 398 (1869). See further *McKenzie v. Hamilton*, H. E. C. 1 (1872). For effect of words “beneficial owner” in a bill of sale see under 42, s. 5, *infra*.

(p) *L. N. & W. R. Co. v. Boulton*, 62 L. T. 398 (1889).

(q) *David v. Sabin*, (1892), W. N. 115. As to whether taxes for local improvements are breach of covenant against incumbrances, see *Egg v. Blayney*, 21 Q. B. D. 107 (1888), and under R. S. O. c. 105, schedule B., *infra*.



## POWERS.

Mode of  
executing  
powers.

18. A deed hereafter executed in the presence of, and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested (*r*), shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is especially required that a deed or instrument in writing, made in exercise of such power, shall be executed or attested with some additional or other form of execution or attestation or solemnity; but this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power, by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend. R. S. O. 1877, c. 98, s. 10.

Powers (under the Statute of Uses) are thus classified by Sugden:—"Powers are either given to a person who has an estate limited to him by the deed creating the power, or who had an estate in the land at the time of the execution of the deed, or to a stranger, to whom no estate is given, but the power is to be exercised for his own benefit; or to a mere stranger to whom no estate is given and the power is for the benefit of others. The two first may be distinguished into two kinds: 1st, appendant or appurtenant; 2nd, collateral, or in gross. The third, it should seem is a power in gross. The latter are termed powers *simply collateral*" (*s*).

The rule as to the forms to be observed in exercising powers and the reasons for the rule are expressed in the following passage:

"Where forms are imposed on the execution of a power, it is either to protect the remainderman from a charge in any other mode, or to preserve the person to whom it is

(*r*) Attested, see *Re Weir*, 14 O. R. 339 (1837).

(*s*) Sugden on Powers, 6th ed. at p. 43.

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(*t*) *Ib.* at p. 26  
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(*x*) See s. 18.  
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given from a hasty and unadvised execution of the power. In each case the circumstances must be strictly complied with: in the first, it would be in direct opposition to the agreement, to consider the estate charged when the mode pointed out is not adhered to; in the second, to dispense with the solemnities and forms required to attend the execution of the power, is to deprive a man of the bridle which he has thought proper to impose on his weakness or frailty of mind, in order effectually to guard himself against fraud and imposition (*t*)."

"The legislature thought fit to require every testamentary instrument to be executed and attested to in the same manner, even where made under a power requiring a different mode of execution and attestation (*u*). The new Act (*v*) does not go so far as to deeds, but *enables* donees of powers which are exercisable by deed to exercise them by deeds executed and attested by two witnesses, just as common deeds may be executed. This will support many deeds which otherwise would be void under powers" (*w*).

19. A person to whom a power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power, whether the power was created by an instrument coming into operation before or after the commencement of this Act: 50 V. c. 7, s. 9.

Person to whom a power is given may release or contract not to exercise same.

This section is taken from 44 & 45 V. c. 41, Imp. s. 52.

*Release* :—The present section is intended to deal mainly with powers *simply* collateral (*x*); which powers are thus defined by Sugden (*y*) :—"A power to a person not having

(*t*) *Ib.* at p. 264.

(*u*) 1 V. c. 26 (Imp.), s. 10; R. S. O. 1887, c. 109, s. 13.

(*v*) *i.e.* the present section.

(*w*) Sugden on Real Property, 2nd ed. at p. 314.

(*x*) *See* s. 18.

(*y*) Treatise on Powers, 6th ed. p. 45.

any interest in the land,—and to whom no estate is given,—to dispose of, or charge the estate in favour of some other person. Perhaps the best instance that can be given of it is a power to a stranger to revoke a settlement, and appoint new uses to other persons designated in the deed.”

Now, the law as to these powers *simply* collateral, before the present section was enacted, was that the donee could not by any Act whatever suspend or extinguish his power (z).

The same was, and now is, the case with a stranger; he cannot bar or extinguish the power (a), the present section affecting only the donee of the power.

Powers not simply collateral (*i.e.* those coupled with an interest) were extinguishable previously to the present section but only where the opposite construction would enable the donee to derogate from his own grant (b). The present section makes such extinction possible in all cases.

The present section does not apply to the case of a power coupled with a duty. “A trustee who has a power coupled with a duty is bound, so long as he remains a trustee, to preserve that power, and to exercise his discretion as circumstances arise whether the power shall be used or not, and can no more by his own voluntary act destroy a power of that sort than he can voluntarily put an end to any other trust that may be committed to him” (c).

*Disclaimer, i.e., renunciation before acceptance*:—The Imperial Conveyancing Act, 1882 (d), has supplemented the power of release given by the present section by add-

(z) *Ib.* p. 48.

(a) *Ib.* p. 49.

(b) *Ib.* pp. 57, 83.

(c) *Re Eyre*, 49 L. T. N. S. 259 (1883); *Lewin on Trusts*, 8th ed. 610. See *Cunynghame v. Thurlow*, 1 Russ & My. 436 (1832).

(d) 45 & 46 V. c. 39, s. 6.

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(e) See *Re Eyre*.

(f) *Wolstenholme*.

(g) *Sugden on p*.

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ing that of disclaimer (e). This later enactment, which has not been adopted by our legislature, is said to have the effect of putting the disclaimer of a power on the same footing as the disclaimer of an estate (f).

Sugden says;—"Devisees, although only trustees, may disclaim the devise to them; but if a man devise that J. S., a mere stranger, or his heirs, shall sell the land, this being a mere power, to which the equity of the statute of wills extends, the release of J. S. shall not hinder the sale, nor can he disclaim; but a man having a power, with an interest given to him, may, it is conceived, divest himself of it by disclaimer" (g). Where the donee of the power may disclaim, the following principles laid down by Lewin will apply:

I. If a power be given to several trustees and one of them disclaims, the power may be exercised by the continuing trustees or trustee.

II. If the power be not given to the trustees by *name* but to the "trustees" or "executors"; it is clear *á fortiori* that if one disclaim the acting trustees or executors may exercise the power (h).

The present section is not intended to cure defects in the title given by the donees other than the defect of their release being formerly invalid:

"For this reason I think it clear that the petitioners can not make a good title to the land in question.

I should add that the position of the vendors is not aided by s. 19 of c. 100, R. S. O. to which I was referred, and which only gives to the donee of a power the right to release or to contract not to exercise it. Whatever might

(e) See *Re Eyre, supra*; and *Re Fisher and Haslett*, 13 L. R. Ir. 546.

(f) *Wolstenholme & Turner*, 5th ed. p. 135.

(g) *Sugden on powers*, 6th ed. p. 49.

(h) *Lewin on Trusts*, 8th ed. 606, 607 and cases there cited.

be the effect of the vendors either releasing or contracting not to exercise the power which they possess, it would certainly not confer upon themselves the right to give the purchaser a good title" (i).

Sale under power not to be avoided by reason of mistaken payment to tenant for life  
Imp. Act 22-23 V. c. 35, s. 13.

20. Where, under a power of sale, a *bona fide* sale is made of an estate, with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, is, by mistake, allowed to receive for his own benefit, a portion of the purchase money or value of the timber or other articles, it shall be lawful for the High Court, upon an action brought or upon application made in a summary way, as the case may require or permit, to declare, that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court directs, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties as in the opinion of the Court are entitled thereto, the sale ought to be established; and upon payment and settlement being made accordingly, the Court may declare that the sale is valid, and thereupon the legal estate shall vest, and go in like manner as if the power had been duly executed, and the costs of the application, as between solicitor and client, shall be paid by the purchaser or the claimant under him: R. S. O. 1877, c. 98, s. 11.

Of this section Sugden says:—

"In a case where a man was tenant for life without impeachment of waste of a settled estate, with a power of sale in trustees to which his consent was necessary, the estate with the standing timber was sold, and the trustees received the value set upon the estate and the tenant for life received the value of the timber; all parties supposing that as he might have cut and sold the timber he was entitled to the value of it although standing, yet the sale was set aside, and the decree was affirmed in the House of Lords (j). The mistake having been discovered, the tenant for life, before the litigation, invested the like amount in the funds in the names of the trustees upon the trusts of

(i) Street, J., in *Re Collard & Duckworth*, 16 O. R. at p. 737 (1880).

(j) *Cookerell v. Cholmeley*, 1 Russ & Myl. 418 (1830); 1 Clark & Fin. 60.

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the settlement, but this circumstance was held not to vary the case. This required a remedy which is contained in the new Act" (*k*).

## AUCTIONS OF ESTATES.

21. In construing the next succeeding three sections of this Act,

Construction of particular words.  
"Auctioneer."  
"Puffer."

1. "Auctioneer" shall mean any person selling by public auction;

2. "Puffer" shall mean a person appointed to bid on the part of the seller. R. S. O. 1877, c. 98, s. 12.

When sale shall be deemed without reserve.

22. Unless in the particulars or conditions of sale by auction of any land it is stated that such land will be sold subject to a reserved price, or to a right of the seller to bid, the sale shall be deemed and taken to be without reserve. R. S. O. 1877, c. 98, s. 13.

23. Upon any sale of land by auction, without reserve, it shall not be lawful for a seller or for a puffer to bid at such sale, or for the auctioneer to take, knowingly, any bidding from the seller or from a puffer. R. S. O. 1877, c. 98, s. 14.

Seller not to bid at unreserved sales.

24. Upon any sale of land by auction, subject to a right for the seller to bid, it shall be lawful for the seller or any one puffer to bid at such auction, in such manner as the seller may think proper. R. S. O. 1877, c. 98, s. 15.

At reserved sales the seller may bid.

The present sections were originally enacted in Ontario by "The Auctions of Estates Act, 1868" (*l*), which had the following preamble: "Whereas there is a conflict between the Courts of Law and Equity in respect to the validity of sales by auction where a puffer has bid, although no right of bidding on behalf of the seller was reserved, and it is expedient that an end should be put to such conflict; and, whereas, as sales by auction are now conducted, many of such sales are illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of

(*k*) The present section, 22 & 23 V. c. 35 (Imp.), s. 13, Sugden New Statutes on Property, 2nd ed. 315; Sugden (Lord St. Leonards) was the author of said Act.

(*l*) 31 V. c. 28 (Ont.).



both the seller and purchaser that such sale should be so conducted as to be binding on both parties."

Said enactment represents the Imperial Act, 30 & 31 V. c. 48; of which, section 4 has the first portion of the above preamble down to "was reserved"; after which it continues: "the Courts of Law holding that all such sales are absolutely illegal, and the Courts of Equity, under some circumstances, giving effect to them, but even in Courts of Equity the rule is unsettled (*m*): and whereas it is expedient that an end should be put to such conflicting and unsettled opinions; be it therefore enacted, that from and after the passing of this Act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed to be invalid in equity as well as at law."

The latter portion of the preamble to our Act of 1868 is the preamble to section 5 of the Imperial Act. The enacting portion of section 5 differs from our Act in rendering it incumbent on the vendor to state whether the sale is with or without reserve.

Section 6 of the Imperial Act is represented by the present section 24. The Imperial Act has a 7th section preventing the opening of biddings except on special grounds (*n*), which section we have not adopted in Ontario.

*Reserved bid and reserved right to bid*:—Our section 22 leaves it doubtful whether the Legislature intended to make a distinction between a reserved price or bidding, and a reserved right to bid. Lord Romilly interpreted the wording of the Imperial Act as implying such a distinction (*o*). Strictly speaking, it would seem that, in view

(*m*) e.g. unsettled by *Mortimer v. Bell*, L. R. 1 Ch. 10 (1865).

(*n*) See *Guest v. Smythe*, L. R. 5 Ch. 551 (1870); *Delves v. Delves*, L. R. 20 Eq. 77 (1875); *Re Bartlett*, 16 Ch. D. 561 (1880); cf. our C. R. 105.

(*o*) *Gilliat v. Gilliat*, L. R. 9 Eq. 60 (1869).

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of his interpretation, our common clause in the particulars or conditions of sale, that "the property will be sold subject to a reserved bid," will not also confer the privileges gained by reserving the right for the seller to bid as mentioned in section 24. So that, if it is intended to have both a reserved bid and one puffer, it will be necessary to say in the particulars that the property will be sold subject to a reserved bid and to a right of the seller to bid (*p*).

*Auctioneer selling below reserved bid:*—Where an auctioneer received an article with instructions not to sell it under a certain price, *held* that if he sell it for a less sum he will be liable to make good the loss (*q*).

*Effect of employment of puffers:*—The fact of puffers being employed by a vendor at a public sale of a number of lots, although none were proved to have bid on the particular lots which the vendee agreed to purchase, was held to be a good ground of answer to a bill by the vendor for specific performance; and a Court of Equity in such case, instead of requiring defendant to prove that some of the organized puffers had bid on the particular lots, might well call upon the plaintiff to prove that none had bid or been instructed to bid thereon (*r*).

25. Nothing in the next preceding four sections contained shall be taken to authorize any seller to become the purchaser at the sale. R. S. O. 1877, c. 98, s. 16. Seller not authorized to purchase.

This section is simply intended to guard against the possible misapprehension that persons hitherto debarred from bidding on account of a fiduciary or quasi-fiduciary relation to the subject of sale, might take advantage of the Act to bid under the above section 24.

(*p*) See *Dimmock v. Hallett*, L. R. 2 Ch. 21 (1866); case where auctioneer stated that the sale was without reserve, but that the parties were at liberty to bid.

(*q*) *Mason v. Chamberlain*, 1 Thom. 2nd ed. 7 (1834).

(*r*) *Jennings v. Hart*, 1 R. & C. 15 (1875).



Application of ss. 21-25. 26. The next preceding five sections shall not apply to any sale which took place before the 4th day of March, 1868. R. S. O. 1877, c. 98, s. 17.

The Act 31 V. c. 28 (Ont.), was assented to 4th March, 1868.

#### RENT-CHARGES.

Release of part of land charged not to be an extinguishment of the charge on the rest, etc. Imp. Act 22-23 V. c. 35, s. 10.

27. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release. R. S. O. 1877, c. 95, s. 1.

*Definition of rent-charge*:—"A rent-charge is where land is charged with a rent by deed or will with power to distrain for the same, but the owner of the rent has no reversion in the land; as where a person conveys to another, land in fee simple, reserving a certain rent payable thereout, with a clause of distress that if the rent be in arrear or behind for a specified number of days, it shall be lawful to distrain for the same. In such case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it" (s).

*Law as to release of rent-charge*:—"The law on this subject, as far as it concerns the matter of the present section (t), is discussed in *Booth v. Smith* (u), in which the rent-charge was an annuity; from which case we may take the following observations:—

According to the old law (before the passing of the present section), the release of part of the land charged with an annuity was a release of the whole land. Various

(s) Woodfall, Landlord and Tenant, 13th ed. 376.

(t) Our section is taken from 22-23 V. 35 (Imp.), s. 10.

(u) L. R. 14 Q. B. D. 318 (1884).

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cumbrous methods were adopted to get over this difficulty, one of which methods was to have a re-grant of the annuity (rent-charge). To get rid of the inconvenience of this state of affairs the present section was passed, enabling part of the land to be released without extinguishing the whole rent-charge.

The first part of the section relates to the case where the *whole* of the land which is subject to the rent-charge is under one ownership. In this case the release of a portion of the land leaves the unreleased portion subject to the rent-charge. But subject to *how much* of the rent-charge? To the *whole* of it.

The second part of the section contains a reservation of the rights of certain interested parties, and is difficult of interpretation. It relates to the cases where the released and the unreleased portions belong to different persons. Firstly, if the owners of the unreleased portion concur in or confirm the release, the unreleased portion will be subject, as above, to the rent charge and to the *whole* of it, secondly, if said owners do not concur or confirm, the Act is *without prejudice* to their rights.

Now, one of the rights of the owners of the unreleased portion previously to the passing of the present section was that, by the release, the unreleased portion also was freed from the charge. Is this right preserved? No, the section does not say the rights of the persons interested shall be the *same* as they would have been if the Act had not been passed, but that they shall not be prejudiced; and it means that such rights as they had which were not *inconsistent* with the earlier part of the section shall be preserved.

Another right of the owners of the unreleased portion was the right to contribution from the owner of the released portion. Is it this right (involving circuitry of action) that is preserved; No; the right to contribution was because

the law meant that each part of the land should not bear more than its proportion of an annuity with which the land was charged. Therefore the owners of the unreleased portion ought not to be liable for more than such proportion of the annuity as corresponded with their portion of the land. Before any part of the land was released they were liable to pay the entire annuity, and if they did so, they had a right to contribution against the owner of the other part. It is that right one must look to in construing the present section, and we ought to so construe it as to say that the unreleased portion is *liable but only for its proportion of the annuity*.

But, if apportionment was meant, why does not the present section mention apportionment? It was not thought desirable that the enactment should say, nor does it say, that in all cases in which a part of the land is released the annuity shall be apportioned, because when the owner of a large estate subject to a rent-charge cuts up his land into parcels, it is not wished often to apportion the rent-charge, but, rather that the whole of it should be thrown on some particular part (*v*).

#### FUTURE AND CONTINGENT USES.

In case of limitation to uses, they shall take effect as they arise without continued seisin or *scintilla juris* in the persons originally seised. Imp. Act 23-24 V. c. 38, s. 7.

28. Where, by any instrument, any hereditaments are limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere. R. S. O. 1877, c. 95, s. 2.

*Scintilla juris*:—This section is spoken of by Sugden (Lord St. Leonards) as putting at rest all anxiety about the

(*v*) The above observations contain as far as brevity will permit the *spissima verba* of the judgments in the above case of Booth v. Smith.

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doctrine of *scintilla juris* (w). Of this, Wharton says:—  
 “*Scintilla juris et tituli* (a spark of law and title). A possibility of seisin, which is supposed to exist in the grantee to uses, when all actual seisin is taken from him by the operation of the statute (of uses), upon a limitation of springing uses, and the creation of contingent ones.

“To illustrate this, let us take a springing use: a grant to A. and his heirs to the use of B. and his heirs, until C. perform an act, and then to the use of C. and his heirs. Here the statute executes the use in B., which [use], being co-extensive with A.’s seisin, leaves no actual seisin in A. When, however, C. performs the act, B.’s use ceases, and C.’s use springs up, and he enjoys the fee-simple; upon which the question arises, out of what seisin is C.’s use served? It is said to be served out of A.’s original seisin, for, upon the cesser of B.’s use, it is contended that the original seisin reverted to A. for the purpose of serving C.’s use, and is a possibility of seisin or *scintilla juris*” (x).

The doctrine of *scintilla juris*, or suspended seisin, was graced by many picturesque expressions, but seems always to have been doubtful law; for instance, Sugden devotes a section of his book on Powers to the demolition of the doctrine (y).

#### CONTINGENT REMAINDERS.

29. Every contingent remainder existing on the 2nd day of March, 1877, or created since that day or hereafter, shall be, and every contingent remainder, which existed at any time between the 30th day of May, 1849, and the 2nd day of August, 1851, shall be deemed to have been capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold. R. S. O. 1877, c. 95, s. 3.

Certain contingent remainders not to be defeated by forfeiture, surrender or merger of preceding estate.

*Contingent remainders*:—“It is not only necessary that a vested legal freehold estate should precede a legal

(w) Property Statutes, 2nd ed. 324.

(x) Law-Lexicon, 7th ed. at p. 751.

(y) Chap. 1, s. 3.

freehold contingent remainder, but some such preceding freehold estate must subsist and endure until the time when the contingent remainder vests, that is until the contingency comes to pass; for it is a general rule that every remainder must vest either during the particular estate, or else at the very instant of its determination" (z).

Take an example of a contingent remainder. Let A. convey land to B. for life (particular estate), and, if D. be living at B.'s decease (the contingency), then to C. and the heirs of his body (contingent remainder in tail), remainder to E. and his heirs (vested remainder in fee simple). Here, according to the rule of common law, the determination of B.'s estate (so as to leave no right of entry in B.) before B.'s decease will destroy C.'s remainder; by destroying the particular estate that "supports" the remainder.

Challis enumerates six modes or causes of destruction of contingent remainders:—1. Forfeiture; 2. Surrender; 3. Merger; 4. Tortious alienation; 5. Turning to a right of action; 6. Natural expiration of the precedent estate (a).

Of these, the first three are abolished by the present section.

1. *Forfeiture*:—"By common law a tenant for life incurred a forfeiture of his estate by making any alienation which divested the remainders and reversion thereupon, or by doing anything in any matter of record which amounted to the assertion of a right in himself to the inheritance, or to an admission of a like right in a stranger;" [e.g. in the above example if B. incurred such forfeiture an entry by E. shuts out C.].

2. *Surrender*:—"If the tenant of the precedent estate had surrendered his estate to the next vested remainderman [in the above example if B. had surrendered

(z) Fearn, at p. 307.

(a) Real Property, at p. 107.

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to E.], such remainderman having an estate of at least as great in *quantum* as the surrendered estate, the precedent estate would have been destroyed by the surrender, and all intervening contingent remainders would, at common law, have been destroyed with it."

3. *Merger*:—"If either by conveyance, or by descent, the next vested estate of inheritance came to the tenant of the precedent estate [*e.g.* if, in the above example, E.'s estate came to B.] the precedent estate was destroyed by merger, and all intervening contingent remainders were destroyed."

4. *Tortious alienation of precedent estate*:—Abolished by section 3 of this Act; which *see*.

5. *Turning of precedent estate to a mere right*:—*i.e.* a right of action is not sufficient to support a contingent remainder. This cause of distinction depends on the old law by which a right of entry was inalienable; *see* section 9 above.

6. *Natural expiration of precedent estate pending the contingency*:—This is still a possible cause of destruction. The present section (b) has been supplemented by 40 & 41 V. c. 33 (Imp.), which we do not appear to have considered worth adopting in Ontario; the effect of which Act is when possible to make the contingent estate (liable to destruction) take effect as an executory limitation.

*Trustees to preserve contingent remainders*:—Formerly the usual method of guarding against such destruction of remainders was by interposing, between the precedent particular estate and the contingent remainder, "trustees to preserve contingent remainders."

It seems that there are cases where the limitation of such an estate to trustees may still be a desirable precaution (c).

(b) Corresponding to 8 & 9 V. c. 106 (Imp.), s. 8.

(c) Bythewood & Jarman, Conveyancing, 4th ed. Vol. VI. p. 401.



*Significance of dates in this section*:—The dates in the present section have the following significance:

The 30th day of May, 1849, is the date of 12 V. c. 71 (Can.) (*d*), which attempted to cut the knot by abolishing contingent remainders, making them take effect as executory estates. This enactment was repealed by 14 & 15 V. c. 7 (Can.), s. 1. This latter enactment is dated 2nd August, 1851, and its 6th section (*e*), gives us our present section 29, with the exception of the first two lines. These two lines were prefixed by 40 V. c. 8 (Ont.), s. 39; which Act was assented to, 2nd day of March, 1877.

#### IMPROVEMENTS UNDER MISTAKE OF TITLE.

Persons  
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30. In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required, to retain the land if the Court is of opinion or requires that such should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land, if retained, as the Court may direct. R. S. O. 1877, c. 95, s. 4.

*Origin and scope of section*:—The first portion of this section down to the semicolon is 36 V. c. 22 (Ont.), s. 1 (Bethune's Act). This enactment passed in 1873, was criticized the following year in *Carrick v. Smith* (*f*): "This is a very extensive protection, and perhaps it may be called very advanced legislation to give a lien *in every case* to a person who has made improvements, even lasting improvements, on any land, *under the belief* that the land was his own . . . This seems rather sharp legislation, but it is unfortunately too absolute in its terms, and it is directed against the only innocent man there is in the transaction [*i.e.* the true owner], and he is without redress. He should be allowed, at any rate, if he elect, to abandon his land on

(*d*) 7 & 8 V. c. 76 (Imp.), s. 8.

(*e*) 8 & 9 V. c. 106 (Imp.), s. 8.

(*f*) 34 U. C. R. at p. 399, *et seq.* (1874).

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being paid the value of it. There would be some equality in that. Such a statute must be carefully executed in all cases."

In *Smith v. Gibson* (g), it was considered that the belief must be a reasonable one; and doubt was raised as to the manner of trying the right to a lien under the statute.

In *O'Connor v. Dunn* (h) the action being ejectment, the party claiming the lien was held entitled to have his lien inquired into and adjudicated upon in the action. The same case raised a *quære* as to how the lien, if established, could be enforced; suggesting that the method of enforcement would be an order to sell the land.

In *Skue v. Chapman* (i), where a mortgagee, 17 years before the bill for redemption, bought the equity at a sheriff's sale, which sale was, on technical grounds, invalid, the court refused redemption, declining to apply the principle of compensation contained in the above Act. An extract from the judgment will show the really limited scope of the principle of compensation: "The Act is a just and salutary one, so far as it goes, and in an ordinary case may enable courts to do justice; but it would fail utterly to enable the court to do anything approaching to justice in a case like this. I have already stated shortly that buildings costing many thousand dollars have been put up upon the premises in question by the purchasers from Chapman and Abbott, and by others purchasing from them from time to time. There have been buildings, fires, re-buildings, alterations and improvements in buildings, conversions of buildings from one purpose to another, sales from one to another, converting fields and commons into sites for houses, shops, hotels, a bank and other places of business, yards and gardens,—in short, all that is ordinarily

(g) 25 U. C. C. P. at p. 252 (1875).

(h) 37 U. C. R. 430 (1875).

(i) 21 Gr. 534 (1874).



incident to a prosperous and growing town in Canada. . . . Supposing the Act to apply, as probably it does, a very little consideration will show that such an allowance for improvements would be no compensation in a case like this."

The latter portion of the present section (below the semicolon) was added by 40 V. c. 7 (Ont.), Schedule A. (114), evidently in view of the criticisms contained in some of the above cases.

*How far this section was an innovation*:—The statute 36 V. c. 22, was probably intended partly to amend the common law, and partly to confirm a recent decision in equity to this effect: that a party in good faith making improvements on property which he has purchased, would not be disturbed in his possession, even if the title prove bad, without payment for his improvements; and that the rule would be actively enforced in a court of equity as well where the purchaser was plaintiff as where he was defendant (*j*).

The antiquity of this rule in equity has been recognized by Mr. Chancellor Boyd in *Munsie v. Lindsay* (*k*):—"This claim for improvements under mistake of title was long recognized as a valid equity, before the statute (*l*) gave it the sanction of a legal right. See cases in Viner's Abr. Tit. Purchaser I. Vol. XVIII. p. 124, one of which is relied on in *Gummerson v. Banting*, 18 Gr. 516."

But various dicta of the Court of Appeal in *Beatty v. Shaw* (*m*), tend considerably to abridge the scope of both the old equity doctrine and the present statutory rule as to compensation, as far as relates to the grounds for

(*j*) *Gummerson v. Banting*, 18 Gr. 516 (1871), commented on in *Beatty v. Shaw*, 14 A. R. at p. 607 (1888); *McLaren v. Fraser*, 17 Gr. 567 (1879).

(*k*) 11 O. R. 528 (1886).

(*l*) Our present section.

(*m*) 14 A. R. 600 (1888).

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(*n*) *Ib.* at p.

allowing compensation at all. The facts in that case make perhaps an extreme instance:—F. and W. were executors; F. executed a mortgage to W. to secure a debt to the estate; after W.'s decease, F. (in his capacity of executor) executed a discharge to the defendants, to whom he conveyed the estate mortgaged. The discharge was held invalid; but, were the defendant's entitled to compensation under the Act?

*The scope of the present section*:—The statute had in view "the case of improvements on land wholly belonging to another and to which the improving occupant turns out to have no claim or title." The owner of an estate, subject to a mortgage, does not come within the statute. In other words, the statute applies to lands not which *are* the defendant's own, but which (under mistake of title) he *believes* to be his own (n).

*Limitations on rule in equity*:—The old equity rule is restricted, in the law of England (1) to the case of the action for mesne profits where the party has been sometimes allowed to recoup himself by setting off the value of the improvements; and (2) to "cases where the legal title has been in the person making the improvements, and the equitable title in another, who is obliged to resort to a Court of Equity for relief, and where the court then acts upon the principle that the party who comes to the court to seek equity, must, himself, be willing to do what is equitable" (n).

"As against the owner having the *legal* title, the Legislature has said that the person who has made the improvements in good faith, shall, to the extent to which the property has been enhanced in value have a lien; having that lien, he has the means of enforcing it in the courts of the country, but apart from the legislation, I have been

(n) *Ib.* at p. 609.

unable to convince myself that, except in the case of fraud, or that the aid of a Court of Equity is required, the courts have any power against the real owner to enforce a claim for compensation for improvements; but, however that may be, such a claim cannot be enforced as against a mortgagee who has registered his mortgage" (o).

*Extent of rule in equity as recognized in Manitoba courts:*—There are several interesting decisions of the Manitoba courts, bearing on the rule of equity as to compensation for improvements under mistake of title. Thus, in *McKenney v. Spence* (p), Wood, C.J., following *Gummerson v. Banting* (18 Gr. 515), says: "I thus interpose to stay the plaintiff in his action at law until he arranges the equities, which have arisen, perhaps, in some measure by his delay in asserting his rights, and pays for the enhanced value of the property by the permanent improvement made upon it *bona fide*; but I cannot altogether say under a reasonable mistake of title . . . It seems the very highest equity that he who shall *bona fide*, in mistake of title, make permanent improvements on land, should, when the true owner takes away the land from him, be compensated to the extent that his improvements have enhanced the permanent value of the land; and in this view I am fortified not only by the reason of the thing, and a sense of natural justice, but also by the highest authority."

In *Confederation Life Assn. v. Moore* (q), the plaintiffs loaned the widow of a testator a sum for the purpose of erecting buildings on the lands devised to her. Afterwards they discovered that certain legacies were a charge on those lands, and attempted to claim a lien for improvements under mistake of title. Taylor, C.J., said:—"No doubt the courts have gone very far in allowing liens for improve-

(o) *Ib.* at p. 610.

(p) *Manitoba Rep. Temp. Wood*, 11, 26.

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(q) 6 *Man. L.*  
(r) 3 *Western*  
(s) 11 *O. R.* 52

ments made under a mistake of title, but was there any such thing here? The widow, the mortgagor, owns the land, and the plaintiffs advanced her money to improve her estate, which she spent in doing so. It is true her estate was encumbered with a charge of which they had notice, but which they chose to disregard. How is there any mistake of title there? . . . They advanced the money to the widow, the owner of the land, and they have the security of her estate and interest in the land, the security upon which they advanced it."

In *Sowden v. Moffatt* (r), the following was the state of facts:—"The defendant having purchased a lot in a town site proceeded to erect certain buildings, as he thought, on the lot he purchased, but in reality on a lot belonging to the plaintiff. The plaintiff saw the defendant erecting the buildings but did not know that the lot on which they were being erected was his property, because the town site was laid out on the open prairie. The plaintiff also at the time he saw the defendant building on the land in question was not aware that it really was his property, nor that it had been conveyed to him under a partition of the town site. It was held by Taylor, C.J., that under such a state of facts the plaintiff had, neither at law nor in equity, deprived himself of his interest in the land, nor could it be considered that the defendant had acquired any interest in the property, or that the plaintiff had stood by and allowed an innocent purchaser to expend money on it: *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Plummer v. Wellington*, 9 App. Cas. 699; *Proctor v. Bennis*, 36 Ch. D. 140; *Story's Equity*, s. 386, and *Marker v. Marker*, 9 Ha. 16."

*Rules for estimating compensation*:—From the case of *Munsie v. Lindsay* (s), may be derived a number of rules

(q) 6 Man. L. R. 162 (1889).

(r) 3 Western L. T. 195 (1892).

(s) 11 O. R. 520 (1886).

for estimating the amount of compensation, in a proper case for compensation (*t*). Some of the elements of the calculation are: I. the value of property at the time when the defendant (*i.e.*, the mistaken owner) acquired it; II. the present value of the property; III. the increment of value arising from other sources than the improvements in question.

I. *To estimate unimproved value*:—In estimating the unimproved value of the land, the governing fact is the price paid for it by the defendant. This may be qualified (1) by his having paid more for favourable terms, *e.g.*, for being allowed to give a mortgage instead of cash; (2) by the fact whether the land, as in its former state, would be worth more or less now than when acquired; (3) by the evidence of surveyors or other experts. This expert testimony is to be harmonized as far as possible with the governing fact of the actual price. "It is not as a general thing the best rule in cases of varying opinion as to the value to reject one set of witnesses *in toto* and to adopt the figures of an opposing set. One might suspect that neither was exactly to be followed, and that truth lay somewhere between the extremes. The very fact that juries arrive at values by some such path of compromise, indicates that it commends itself to the ordinary mind as a rough and ready mode of solving a difficult question. And even legally trained intellects have resorted to this expedient in despair of finding any more precise method of arriving at a conclusion. I recall the language of Sir Anthony Hart, in *Scott v. Dunbar*, 1 Moll. at p. 487, where he says, 'There is nothing which raises such differences of opinion as the value of the land. Surveyors vary so widely that I know of no mode less unsatisfactory than the rough

(*t*) As to what are improvements, see *Robinet v. Pickering*, 44 U. C. R. 337 (1879); the clearing of land for farming purposes is a permanent improvement. As to improvements by purchaser at tax sale, see *Compton v. Pope*, 1 P. E. I. 181 (1861).

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(u) *Ib.* at p. 52

(v) See *Fawcett*

(w) In 10 P. R.

approximation by taking a mean of all their estimates.' A like method of arriving at the average was adopted by Lord Lyndhurst, and is worked out by him in *Pott v. Curtis*, Younge, R. at pp. 555 and 559" (u).

II. *To estimate improved value*:—The value of the land in its improved state may be estimated, (1) by what it can be sold for; (a *forced sale*, however, is not a correct method of estimating the enhancement in value) (v); (2) by the evidence of the valuers or other experts.

III. *The increment of value from other sources than the improvements*:—This is not always easy of calculation. For instance, in our case of *Munsie v. Lindsay* (w), the Master makes an estimate in the following manner:—"In this case there was evidence that the farms in the township had increased in value since 1866 by reason of certain railroads. The evidence on this latter point was very general, and has made it difficult to arrive at a fair estimate of such increased value. I think on the whole it will be more accurate, and therefore safer, to base such value upon actual calculations rather than the random guesses of witnesses. Several witnesses showed that the opening of railroads in the locality had had the effect of reducing the cost of transporting grain to market by about two cents per bushel, and that the farms in the neighbourhood produced about 1,400 bushels a year. This would give a profit of about \$28 per year. From this would be deducted the annual railway tax, at present about \$10 a year, which would leave a net annual profit of \$18 representing the annual interest on capital of \$300."

Having settled the values of the three main elements in the calculation, if we then proceed in the first place to subtract the increment arising from other causes than the

(u) *Id.* at p. 526.

(v) See *Fawcett v. Burwell*, 27 Gr. 445 (1880).

(w) In 10 P. R. at p. 178.



improvements, from the total improved value; and from the result of that subtraction, in the second place to subtract the unimproved value; then this latter result will be the value of the improvements to be allowed.

This calculation is disturbed, however, by two contrary claims; IV. a claim against the defendant for occupation rent (*x*); and, V. a contra claim by the defendant for interest on the value of his improvements.

IV. *Occupation rent*:—This matter is very fully discussed in *Munsie v. Lindsay (y)*:—"The Master has charged occupation rent on the unimproved value, and has allowed no interest on the value of the improvements. The appeal is because the Master should have estimated the rental on the full improved value. He has proceeded on this principle: that the occupation rent should be based upon the rental value of the farm unimproved unless interest is allowed on the expenditure for improvements: 10 P. R. 180.

"None of the cases referred to justifies this broad conclusion. . . . While the general authorities differ in some details, owing perhaps to special circumstances, there is yet a general accord upon the chief principles which regulate the manner of accounting under this head of equity. . . . Apart from the statute, when lasting improvements were the subject of compensation, whether in favour of a mortgagee or a part owner, or a stranger, the rule was to make him account for profits of the whole property improved. It is difficult to refer to express decisions because the matter has been very much taken for granted as in *Carroll v. Robertson*, 15 Gr. at p. 177, where it is assumed that if improvements are allowed to a person he should be charged with the enhanced rental owing to them. But *Marshall v. Cave*, 3 L. J. Ch. O. S. 57, more

(*x*) See *McCarthy v. Arbuckle*, 31 U. C. C. P. 405 (1881).

(*y*) 11 O. R. beginning at p. 527.

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fully noted by Mr. Coventry in his edition of *Powell on Mortgages*, Vol. II. p. 957*a*, is a clear case as to a mortgagee, and *Gibbons v. Snape*, De G. J. & S. 622, 626, 627 and 633, is an equally clear case as to a part owner. See also *Attorney-General v. Balliol College, Oxford*, 9 Mod. at p. 412 and *Paul v. Johnson*, 12 Gr. at p. 482.

"The next point to be observed is, that when lasting improvements were not allowed to the person in possession he was not charged with any increase of rent attributable thereto. This is so laid down by Mowat, V.C., in *Carroll v. Robertson*, 15 Gr. 173 (z), and it is also the subject of a late decision in the English Court of appeal: *Bright v. Campbell*, 54 L. J. Ch. 1077."

*V. Interest on value of improvements*:—"There is more uncertainty, however, touching the next step in accounting and that is, whether charging increased rental, interest should, on the other side, be computed upon the value of the improvements . . . No doubt a difficulty as to interest on the expenditure for improvements, arises from the terms of the Act by which the lien is limited to the amount of enhanced value at the date of action. The question then is not what the improvements have cost, but what are they worth at the time of recovery. That value defines the measure of the lien which cannot be exceeded. But the statute does not interfere with the manner of accounting as to the occupation rent having regard to the improvements. That remains to be settled so that the equitable restitution shall, as far as possible, be awarded on each side. . . . The claim for full rent of the improved land and the counter-claim for interest on the outlay appear to be reciprocal and entitled to equal respect. Money, or money's worth, produces the improvements; the improve-

(z) In this case it was held that the mistaken owner was to be allowed more liberally for improvements than a mortgagee in possession as such; but see 10 P. R. 173 (*Munsie v. Lindsay*).



ments help to produce the rent, and if increased rent is given on one side the interest of the money should be received on the other. . . . In many cases, and perhaps in the present, it will be found that there is no substantial difference between the interest on the outlay for improvements and the increased occupation rent arising therefrom, and in such cases it will be a convenient working rule to set off one against the other. . . . In view of the great expense and uncertainty arising from the investigation of these details of past transactions, of which no record is kept, it would be a merciful interposition on the part of the legislature to cut the knot by declaring that the increased rental should be set off, as of course, against the interest of the money expended on improvements, unless a special case is made to justify further inquiry" (a).

*Compensation to purchaser at tax sale:*—Where a defendant purchased at a tax sale (afterwards set aside for irregularities), he was held entitled to compensation under the present section for improvements, in addition to the compensation allowed by the Assessment Act (b).

*Compensation for improvements during litigation:*—The rule as to compensation for improvements made during litigation pending is laid down in *O'Grady v. McCaffray* (c). In this case the plaintiff first brought an action for ejectment, which he discontinued; and then subsequently commenced a suit for the recovery of the lands. It was held that the defendant was entitled to compensation for improvements (1) made before the ejectment action; and (2) made between the discontinuance of the action and the

(a) *Ib.*; see further *McGregor v. McGregor*, 27 Gr. 470, 5 O. R. 617 (1884); *Weaver v. Vandusen*, 27 Gr. 477 (1880); *Foott v. Rice*, 4 O. R. 94, 12 A. R. 351 (1885); also the numerous cases cited in *Munsie v. Lindsay*, 1 O. R. 164; 10 P. R. 173, 432; 11 O. R. 520 (1886).

(b) *i.e.* R. S. O. (1877), c. 180, s. 159 (now *The Consolidated Assessment Act* 1892, s. 192): Decided in *Haisley v. Somers*, 13 O. R. 600 (1887).

(c) 2 O. R. 309 (1882).

commencement during the period of commencement

31. In case an action is brought against a person who, according to *The Lands Act*, is found, in an action, to have improved on lands, the action is tried shall for the defendant for any improvement made, and also assess, or direct, to be recovered, and no writ of possession or paid the amount of the land to the defendant, on the fourth day of the month, to the plaintiff, tenders, to the plaintiff, R. S. O. 1877, c. 51,

32. In all cases in which such action is tried, the value of the improvement, as shown in the next paragraph, upon land not his own, where it satisfactorily test the plaintiff's action, the value of the improvement, the alteration and expense, the Judge, before whom the fact upon the record, entitled to the costs of the time of appearing, or his solicitor, of the fact, and that, on payment, would surrender the defendant did not in plaintiff; and if on the given as aforesaid, or less amount than that the defendant had received after tender made of the value of the improvement, the Judge shall not order the plaintiff; and, upon no evidence shall be received, R. S. O. 1877, c. 51, s.

commencement of the second suit; but not (3) made during the pendency of the ejectment action or after the commencement of the second suit.

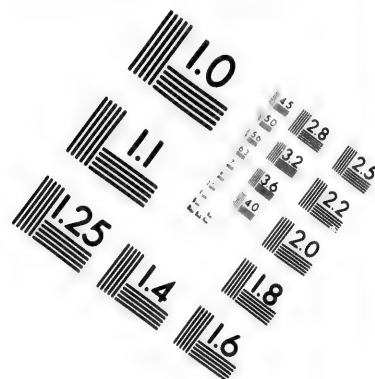
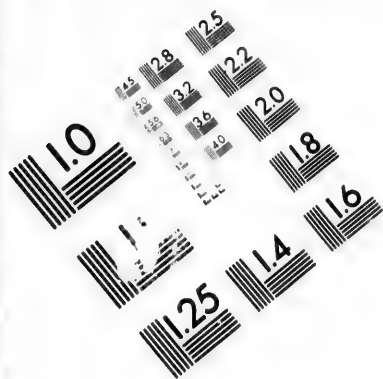
31. In case an action for the recovery of land is brought against a person who, after any line or limit has been established according to *The Act respecting Surveyors and the Survey of Lands*, is found, in consequence of unskillful survey, to have improved on lands not his own, the Judge before whom the action is tried shall assess, or direct the jury to assess, damages for the defendant for any loss he may sustain in consequence of any improvement made before the commencement of the action, and also assess, or direct the jury to assess, the value of the land to be recovered, and if the verdict or finding be for the plaintiff, no writ of possession shall issue until the plaintiff has tendered or paid the amount of such damages, or has offered to release the land to the defendant, provided that defendant, before the fourth day of the ensuing sittings of the High Court pays, or tenders, to the plaintiff the value of the land so assessed. R. S. O. 1877, c. 51, s. 29.

32. In all cases in which the Judge, or the jury before whom such action is tried, assess damages for the defendant as provided in the next preceding section, for improvements made upon land not his own in consequence of unskillful survey, and where it satisfactorily appears that the defendant does not contest the plaintiff's action for any other purpose than to obtain the value of the improvements made upon the land previous to the alteration and establishment of the lines according to law, the Judge, before whom the action is tried, shall certify such fact upon the record, and thereupon the defendant shall be entitled to the costs of the defence: provided the defendant at the time of appearing, gave notice in writing to the plaintiff, or his solicitor, of the amount claimed for such improvements, and that, on payment, the defendant or person in possession would surrender the possession to the plaintiff, and that the defendant did not intend at the trial to contest the title of the plaintiff; and if on the trial it be found that notice was not given as aforesaid, or if there be assessed for the defendant a less amount than that claimed in the notice, or it be found that the defendant had refused to surrender possession of the land after tender made of the amount claimed, then and in such case the Judge shall not certify, and the defendant shall pay costs to the plaintiff; and, upon the trial of any action after such notice, no evidence shall be required in proof of the title of the plaintiff. R. S. O. 1877, c. 51, s. 30.

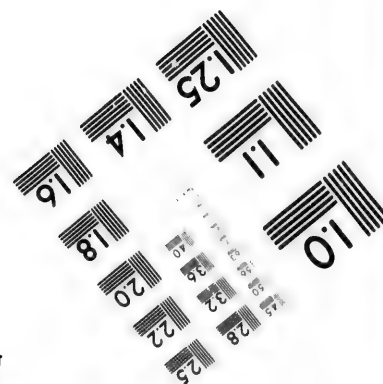
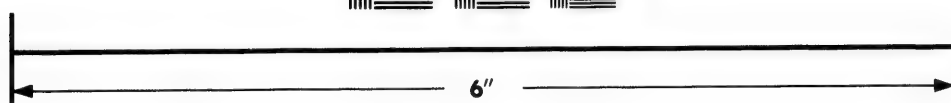
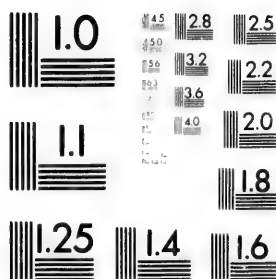
As to cases where, from unskillful survey, a party has improved lands afterwards found to belong to his neighbour. R. S. c. 152.

Plaintiff not to have costs from the time defendant offers to give up the lands on receiving the value of his improvements.

Unless the improvements are assessed at less than the sum demanded. When no proof of plaintiff's title required.



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*Origin and object of these sections:*—These are older sections than the preceding one (s. 30). Section 31 actually dates from 1818 (*d*). Section 32 came in in 1839 (*e*).

This legislation was explained by Chief Justice Robinson as follows:

“It has often happened that the township line has not been run on one uniform course through all the concessions, though it must have been intended to have so run, and in other cases the township line may have varied, not merely in parts, but wholly from the course marked in the diagram, from which the patents were framed. But, for the sake of making the lots in each concession range uniformly, the legislature thought it expedient to take the actual course of the exterior side line of the township, as marked upon the ground at the end of each concession, for the standard, and to provide that the side lines of all the lots in the same concession shall correspond with that, whether the township line, as laid out on the ground in the original survey, was run on the proper course or not.

“Yet it would seem obvious that whenever these new principles of survey could not be carried into effect without disturbing the occupation of parties who had taken possession agreeably to the terms of their patent, before this statute was passed, it would not be just to allow such possession to be interfered with without compensating them for their improvements.

“There is much ground, I think, for holding that the Legislature intended only to protect parties who have settled according to original surveys, made before the statute was passed, which, when tested by the principles laid down by the statute do not prove to be in conformity with them.

(*d*) 59 Geo. III. c. 14 (U. C.), s. 12; see *Beaty v. Shaw*, 14 A. R. 602 (1888).

(*e*) 2 V. c. 17 (U. C.), ss. 1 & 2.

“On the words of the surveys made by the rules prescribed for the surveys which were tested merely as a remedial measure therefore made.

“Without confess, I submit that a defence to the clause is made after the licensed public.

In a form the Act of 5 upon request authority (*h*); tion took place.

Both the Act by 12 V. c. 35 unskilful survey.

“Shall assume line, first appeared in consistence which introduced by a judge (*j*).

(*f*) *Doe d. Har-*  
21 U. C. R. 279 (1866).

(*g*) *Doe d. Gall-*

(*h*) Cf. *Campbe-*

(*i*) *Campbell v. Trotter*, 16 U. C. C. (1866). See also *Mo-*

(*j*) The present R. S. M. c. 48, ss. 3.

"On the other hand, it may be contended that the words of the 12th clause are large enough to comprehend surveys made after the statute, as well as before, and surveys not merely erroneous, because they differ from the rules prescribed for the first time by the statute, but also surveys which would at any rate have been erroneous if tested merely by the original plan of survey. The Act is a remedial one founded on principles of equity, and parties therefore may claim to have it liberally construed.

"Without at present determining this point, which, I confess, I should desire to see made clearer by an amendment of the law, this much, at least, is in my opinion plain, that a defendant in ejectment cannot claim the benefit of the clause by reason of his having relied upon a survey made after the passing of the Act by any *other than a licensed public surveyor (f)*.

In a former case (*g*), the Chief Justice had held that the Act of 59 Geo. III. applied equally to surveys made upon request of individuals and to those made by public authority (*h*); and to cases where the defendant's occupation took place after the Act was passed.

Both the Act of 59 Geo. III. and 2 V. were superseded by 12 V. c. 35; which Act was held to apply to a case of unskilful survey made before the enactment (*i*).

"*Shall assess*":—The words "shall assess," in the 6th line, first appear in the revision of 1877: they were inserted in consistence with the Act, 32 V. c. 6 (Ont.), s. 18 (1), which introduced a provision for the assessment of damages by a judge (*j*).

(*f*) *Doe d. Hare v. Potts*, 5 U. C. R. 494 (1849); cf. *Swanston v. Strong*, 21 U. C. R. 279 (1861), where the C.J. expresses the same doubts.

(*g*) *Doe d. Gallagher v. McConnel*, 6 O. S. 347 (1842).

(*h*) Cf. *Campbell v. Ferguson*, below.

(*i*) *Campbell v. Ferguson*, 4 U. C. C. P. 414 (1855), followed in *Hutton v. Trotter*, 16 U. C. C. P. 367 (1866), and *Morton v. Lewis*, 16 U. C. C. P. 485 (1866). See also *Mozier v. Kegan*, 13 U. C. C. P. 547 (1863).

(*j*) The present two sections 31 and 32 have been adopted in Manitoba, as R. S. M. c. 48, ss. 34 and 35.

*What is evidence of improvements:*—As to what is sufficient evidence of improvements to go to a jury, it has been held that a well and a rail fence constitute such (*k*).

*Measure of compensation:*—It would seem that in estimating the amount of compensation, not the money actually expended on the improvements, *i.e.*, the cost, but the value of the improvements at the time the land is taken from the defendant, is to be considered (*l*).

*Form of Notice:*—As to the form of notice, see *Campbell v. Ferguson*, cited above.

*Effect of improper instructions for survey:*—It is to be borne in mind that the error must arise from unskilful survey, and that cases may arise where, from the instructions for the survey being wrong, and not through any lack of skill, an error occurs; and such an error is not within the Act (*m*).

*Estoppel by acquiescence in boundary line:*—When a boundary line has been run between adjoining proprietors of land by a surveyor mutually employed by them, and has been acted upon for a number of years and conveyances made according to it, it is binding upon them though it was incorrectly run and deviated from the description in the deeds under which they held, and gave one of the parties a much greater quantity of land than he was entitled to (*n*). Where more than one survey had been made, and defendant filed a plan adopting one, a private survey, it was held he was not estopped by such filing from claiming land not included in the plan so filed (*o*).

(*k*) *Morton v. Lewis*, 16 U. C. C. P. 485 (1886).

(*l*) *Plumb v. Steinhoff*, 2 O. R. 614 (1882). Reversed on other grounds, 11 A. R. 788; 14 S. C. R. 739.

(*m*) See *Doe d. Moule v. Campbell*, 8 U. C. R. 19 (1851).

(*n*) *Doe d. Carr v. McCullough*, 1 Kerr, 460 (1842). Cf. *Steeper v. Harding*, 21 S. C. N. B. 143 (1884).

(*o*) *Johnston v. Clarke*, 2 B. C. L. R. 56, 81 (1884).

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## PURCHASES OF REVERSIONS.

33. In the succeeding two sections the word "Purchase" shall mean any kind of contract, conveyance or assignment, under or by which any kind of property may be acquired. R. S. O. 1877, c. 95, s. 7.

"Purchase"  
—what it  
shall mean.

34. In case any purchase made before the 4th day of March, 1868, of any reversionary interest in real or personal estate is sought to be opened or set aside on the ground of undervalue, the *onus* of proving undervalue shall lie upon the plaintiff. R. S. O. 1877, c. 95, s. 5.

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35. No purchase made after the said date *bona fide*, and without fraud, of any reversionary interest in real or personal estate, shall be opened or set aside on the ground of undervalue. R. S. O. 1877, c. 95, s. 6.

Purchases  
after March  
4, 1868, not  
affected by  
undervalue.

*Origin of these sections:*—These sections, first enacted in Ontario by "The Purchases of Reversions Act, 1868" (*p*), are taken from the Imperial Act, 31 & 32 V. c. 4. The date, 4th March, 1868, is the date of assent to our Act.

*Words omitted from our Act:*—Section 1 of the Imperial Act is rather fuller than our section 35; for it contains, after the words "without fraud," the words "or unfair dealing"; again the Imperial section says "*merely* on the ground of undervalue."

*Fry v. Lane* (*q*), is an instructive decision on the Imperial section by Mr. Justice Fry:—"Long before the passing of that Act it was settled that the Court of Chancery would relieve against a sale or other dealing with a remainder or reversion at an undervalue on that ground alone, and this even where the remainder man was of mature age and accustomed to business (*r*). . . . In such cases it was held that the *onus* lay upon the purchaser to shew that he had given the 'fair' value, as it was called

(*p*) 31 V. c. 27 (Ont.).

(*q*) L. R. 40 Ch. D. 312 (1888).

(*r*) Citing seven cases.



in *Earl of Aldborough v. Trye* (s), or 'the market value': *Talbot v. Staniforth* (t).

By the following passage from the same judgment we are led to doubt the value of that brevity which left out the word "merely":—"It is obvious that the words 'merely on the ground of undervalue' do not include the case of an undervalue so gross as to amount of itself to evidence of fraud; and in *Earl of Aylesford v. Morris* (u), Lord Selborne said that this Act 'leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord Hardwicke, raise from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion or advantage taken of that weakness—a presumption of fraud.' 'Fraud,' says Lord Selborne, 'does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand, unless the person having the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just and reasonable.'

"The most common case for the interference of a Court of Equity is that of an expectant heir, reversioner, or remainderman who is just of age, his youth being treated as an important circumstance. Another analogous case is where the vendor is a poor man with imperfect education, as in *Evans v. Llewellyn* (v); *Haygarth v. Wearing* (w).

(s) 7 Cl. & F. 436, 456 (1840).

(t) 1 J. & H. 484, 503 (1860).

(u) L. R. 8 Ch. 484, 490 (1873).

(v) 1 Cox, 333 (1787).

(w) L. R. 12 Eq. 320 (1871).

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(x) 3 Madd. 41

(y) 2 Giff. 157

(z) See 4, D. F.

(a) 4 D. F. & J.

(b) 4 D. J. & S.

(c) 8 H. L. C. 4

"In the case of a poor man in distress for money, a sale even of property in possession, at an undervalue has been set aside in many cases, as in *Wood v. Abrey* (x), where the only professional person employed was the purchaser's attorney, and the price was one-fourth of the value, Sir John Leach saying:—'A Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances and that advantage was taken of that distress, it will avoid the contract.'

"So in *Longmale v. Ledger* (y), which it seems was affirmed on appeal (z) where property in possession was sold for a price greatly below the value and one solicitor acted for vendor and purchaser, and the vendor was a man advanced in years, and known to have been of a weak and eccentric disposition.

"In *Clark v. Malpas* (a), an improvident sale of property in possession by a poor and illiterate man, the same solicitor being employed by both parties, was set aside. Again, the same thing was done in *Baker v. Monk* (b), when the vendor was an elderly woman in humble life, and the purchaser a substantial tradesman, whose solicitor carried out the transaction for both parties, the consideration being an annuity of 9s. a week for the life of the vendor. In that case, Turner, L.J., distinguishes *Harrison v. Guest* (c)—a case in which the transaction was allowed to stand—on the ground that there the offer came first from the vendor, and the purchaser advised him to take time to consider and to consult some one else about it, no such advice having been given by the vendor in *Baker v. Monk*.

(x) 3 Madd. 417, 423 (1818).

(y) 2 Giff. 157 (1860).

(z) See 4, D. F. & J. 402.

(a) 4 D. F. & J. 401 (1862).

(b) 4 D. J. & S. 388 (1864).

(c) 8 H. L. C. 481 (1861).

*Summary of decisions:*—"The result of the decisions is that, where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.

"This will be done even in the case of property in possession, and *a fortiori* if the interest be reversionary. "The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just and reasonable.'

*Solicitor acting for both sides:*—Speaking of the particular circumstances of this case, his Lordship continued: "I regret that I must come to the conclusion that, though there was a semblance of bargaining by the solicitor in each case, he did not properly protect the vendors, but gave a great advantage to the purchasers who had been former clients, and for whom he was then acting. The circumstances illustrate the wisdom and necessity of the rule that a poor, ignorant man, selling an interest of this kind, should have independent advice, and that a purchase from him at an undervalue should be set aside, if he has not. The most experienced solicitor acting for both sides, if he allows a sale at an undervalue, can hardly have duly performed his duty to the vendor. To act for both sides in such a case, and permit a sale at an undervalue, is a position in which no careful practitioner would allow himself to be placed.

*Delay or acquiescence:*—As to the effect of delay or acquiescence, his Lordship continues: "In *Gowland v. De Faria* (d), Sir William Grant, in a like case, said: 'There is, I believe, no case in which, during the continuance of the same situation, in which the party entered into

(d) 17 Ves. 20, 25 (1810).

the contract has always been pressed home coming to from the performance in *Beynon* whose judgment is correct possession

*Unfair dealing:*—"unfair dealing" may adopt moral fraud Lane or W dealing, with rather the

*As to the rule:* no absolute cases. Some of the plaintiff *Twisleton v. As in Bromley* upon the deed there being case (i).

*O'Rourke:* there is much subject, and

(e) L. R. 10

(f) 1 P. W.

(g) 26 Beav.

(h) L. R. 15

(i) Fry v. L.

(j) L. R. 2

the contract, acquiescence has ever gone for anything: it has always been presumed, that the same distress which pressed him to enter into the contract, prevented him from coming to set it aside; that it is only when he is released from that distress that he can be expected to resist the performance of the contract.' The same rule was applied in *Beynon v. Cook* (e), where the late Master of the Rolls, whose judgment was affirmed, says that the state of distress is considered to continue till the reversion falls into possession.

*Unfair dealing*:—As to the necessity of the words "unfair dealing," and as to what "fraud" will include, we may adopt his Lordship's words: "I am of opinion that no moral fraud has been proved in either case on the part of Lane or Whittet, but such transactions amount to unfair dealing, which equity considers a fraud, though I would rather the word were used for moral delinquencies.

*As to the costs in such cases*:—"I am glad to find that no absolute rule has been laid down by the court in these cases. Sometimes where the only ground was undervalue, the plaintiff has been relieved on payment of costs, as in *Twisleton v. Griffith* (f). In some cases no costs are given, as in *Bromley v. Smith* (g); sometimes the costs are thrown upon the defendant as in *Nevill v. Snelling* (h)." Owing to there being no moral fraud, no costs were given in this case (i).

*O'Rorke v. Bolingbrook* (j) is an earlier case, in which there is much interesting discussion of the law on this subject, and also considerable diversity of opinion among

(e) L. R. 10 Ch. 389, 393 (1875).

(f) 1 P. Wms. 310 (1716).

(g) 26 Beav. 644, 676 (1859).

(h) L. R. 15 Ch. D. 679, 705 (1880).

(i) *Fry v. Lane*, *supra*.

(j) L. R. 2 App. Ca. 814 (1877).

the judges; Lords Blackburn and Gordon being of opinion that there was no evidence of fraud; while Lord Hatherly laid great stress on the fact of the reversioner having no independent adviser to protect him.

*To apply rule, property must be a reversion:—*It seems that before applying any of the rules contained in the above decisions for the relief of the vendor of a reversion it is necessary that the property sold must be a reversion. This is the view taken by Lord Chelmsford:—"I confess myself unable to comprehend the nature of the alleged reversion. The real interest of the plaintiff was that of a life estate in possession in the moneys and funds, subject to rent-charges and mortgages, which nearly absorbed the whole of the interest. The death of Dame Charlotte (*the owner of the charge*) will not occasion the falling in of a reversion, but will merely release the plaintiff's life estate from a charge of £1,000 per annum, and occasion an addition to the surplus after satisfying the remaining charges to that extent. The case cannot, in my judgment, be treated as the purchase of a reversion, and the decree which proceeded upon that ground cannot be supported" (*k*).

Lord Selborne's judgment in *Earl of Aylesford v. Morris* (*l*), from which a quotation has been given above, compares the rule in equity with the legal rule and with the principle of the usury laws; and also analyses the reasons on which the rule in equity was supported.

That the present enactment does not cover the whole ground of the equity rule as to the purchase of reversions from "expectant heirs" and as to their relief from "hard bargains" will appear from the decision of Jessel, M.R., in *Beynon v. Cook* (*m*).

(*k*) L. R. 2 Ch. 546 (1867).

(*l*) L. R. 8 Ch. 489 (1873).

(*m*) L. R. 10 Ch. 392 (1875).

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(n) 16 Gr. 376  
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(o) 4 A. R. 60

## PURCHASER FOR VALUE WITHOUT NOTICE,

36. It shall in no case be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money or purchase money, or any part thereof. R. S. O. 1877, c. 95, s. 9.

Proof of payment of purchase money unnecessary.

*Law prior to enactment of this section:—*In *Price v. Brady* (n), we had the following decision of Spragge, V.C.: "Brady's defence is that he was a purchaser for value, and that he had no notice. He does not, however, allege all that is necessary to constitute a good defence on this ground. He merely says that he had no notice of plaintiff's claim at the time he made his purchase of the land from C. H.; and that the consideration therefore paid to him was actual and *bona fide*. He does not negative notice before he paid his purchase money, or before he received his conveyance. And further, he gives no evidence of the payment of any consideration money." This decision was rendered in 1869.

The present section was originally enacted by 39 V. c. 7 (Ont.), s. 11 (assented to 10th February, 1876). The words "mortgage money or" were inserted by 40 V. c. 7 (Ont.), Sched. A. (115).

*Judicial criticism of this section:—*Vice Chancellor Proudfoot somewhat severely criticised the present enactment in *Peterkin v. Macfarlane* (o): "The rule in England is perfectly clear in favour of the owner, that the whole purchase money must be actually paid, not merely secured to be paid. In the American courts opinions are divided, some adopting the English rule, others protecting a purchaser to the extent of the money paid.

"I fail to see, therefore, that the English rule, the one binding upon us, can fairly be characterized either as

(n) 16 Gr. 376 (1869); see also *Harvey v. Smith*, 2 E. & A. 480 (1864), as to the necessity for the payment of the *whole* purchase money before notice.

(o) 4 A. R. 60 (1879); case affirmed, 9 A. R. 429; 13 S. C. R. 677.

inequitable or unjust. It has been acted on for centuries, and received the sanction of judges of the highest eminence.

"It is true that for the future this will, to a great extent, be merely a speculative question, as the legislature has protected the purchaser, who may not have paid one cent of his money. R. S. O. c. 95, s. 9 (*p*).

"It would obviously be improper in me to question the wisdom or the equity of such an enactment, nor in this case do I need to do so, for the Act is not retrospective, and I am quite within the limits of the Act while saying that for the past the rule was good; for the future it will be bad."

#### FRAUDS ON SALES AND MORTGAGES.

Punishment of vendor or mortgagor for fraudulent concealment of deeds, etc., or falsifying pedigree.  
Imp. Acts 22-23 V. c. 35, s. 24, and 23-24 V. c. 38, s. 8.

37. If any seller or mortgagor of land, or of any chattels, real or personal, or *choses in action* conveyed or assigned to a purchaser or mortgagee, or the solicitor, or agent of any such seller or mortgagor, conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, he shall, in addition to any criminal liability he may thereby incur, be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them, or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate is recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land. R. S. O. 1877, c. 98, s. 18.

*Object of this section*:—The object of this enactment may properly be explained by its author, Lord St. Leonards (*q*).

(*p*) *i.e.* the present section.

(*q*) Sugden (Lord St. Leonards) Property Statutes, 2nd ed. 319.

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*Penalty* provides:—

370. Everyon a fine, or to two seller or mortgag or chose in action mortgagor (and any abstract of t gagee before the ceals any settleme the title, or any in or falsifies any p intent to defraud mortgagee to acc R. S. C. c. 164, s

(*r*) 22 & 23 V.

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"The last enactment (*r*) under this head will afford a great safeguard to purchasers and mortgagees, and will protect the great body of respectable solicitors from the acts of the few unworthy members of their own body.

"The words 'or mortgagee' were omitted by mistake in the Commons; they are now supplied by 23 & 24 V. c. 38, s. 8."

In *Smith v. Robinson* (*s*) it was one of the conditions of sale that the abstract of title should commence with an indenture dated the 30th day of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser. The following is an extract from this case:—Counsel for the defendant: "A solicitor might make such a condition, knowing of the existence of some prior incumbrance on the property, and then, afterwards, voluntarily disclose the incumbrance, and thus escape the penalties imposed by 22 & 23 V. c. 35, s. 24."

Fry, J.: "Could he be liable to that penalty where the condition was, that no title should be shewn before a certain date?"

*Penalty for such fraud*:—The Criminal Code, 1892, provides:—

370. Everyone is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who, being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor (and having been served with a written demand of any abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him. R. S. C. c. 164, s. 91.

Concealing deeds or incumbrances or falsifying pedigrees.

(*r*) 22 & 23 V. c. 35 (Imp.), s. 24.

(*s*) L. R. 13 Ch. D. 148 (1879).



## SCHEDULE.

## FORM OF CONVEYANCE BY BENEFICIAL OWNER UNDER SECTION 17.

This Indenture made the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_

Between (here insert names of parties and recitals, if any,) Witnesseth, that in consideration of \_\_\_\_\_ dollars, of lawful money of Canada, now paid by the said grantee to the said grantor (the receipt whereof is by him acknowledged,) he, the said grantor, as beneficial owner, doth convey unto the said grantee in fee simple (or otherwise as the case may be), all, etc., (*parcels*).

In witness whereof, the said parties hereto have hereunto set their hands and seals.

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INTERPRETATION  
OBLIGATION TO

s. 2.

INSPECTION OF  
APPLICATION OF

s. 4.

IMPLIED COVENANT  
RELEASE OF EQUITY

ss. 8-10.

PROOF OF MORTGAGE  
FORECLOSUREEXECUTORS, ETC.  
MAY ASSIGN

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s. 12.

DISCHARGE OF  
MADE AT ANY

HER MAJESTY  
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enacts as follows

1. Where the will is  
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ordinary intention app

(1) "Property" means  
any debt, and any  
interest.

(2) "Land" includes  
corporeal or incorporeal  
undivided share in

(3) "Conveyance" means  
settlement, and other  
made by deed, on

## R. S. O. 1887, CHAPTER 102.

### An Act respecting Mortgages of Real Estate.

INTERPRETATION, s. 1.	EFFECT OF ADVANCE ON JOINT ACCOUNT, s. 14.
OBLIGATION TO TRANSFER MORTGAGE, s. 2.	RECEIPTS OF MORTGAGEE OR SURVIVOR OF TWO OR MORE MORTGAGEES TO BE EFFECTUAL DISCHARGES, s. 15.
INSPECTION OF TITLE DEEDS, s. 3.	RIGHT OF MORTGAGEE TO DISTRAIN LIMITED, ss. 16-17.
APPLICATION OF INSURANCE MONEY, s. 4.	POWER OF SALE AND INCIDENTAL POWERS TO BE IMPLIED, ss. 18-29
IMPLIED COVENANTS, ss. 5-7.	TAXATION OF COSTS, ss. 28, 31.
RELEASE OF EQUITY OF REDEMPTION, ss. 8-10.	RESTRICTION AS TO PROCEEDINGS ON MORTGAGES, s. 30.
PROOF OF MORTGAGE ACCOUNT IN FORECLOSURE PROCEEDINGS, s. 11.	PAYMENT IN TERMS OF NOTICE TO BE ACCEPTED, s. 31.
EXECUTORS, ETC., OF MORTGAGEES MAY ASSIGN, RELEASE, ETC., LEGAL ESTATE IN CERTAIN CASES, s. 12.	DEFENCE OF PURCHASE FOR VALUE WITHOUT NOTICE, s. 32.
DISCHARGE OF MORTGAGE MAY BE MADE AT ANY TIME, s. 13.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows :—

1. Where the words following occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

(1) "Property" includes real and personal property, and any debt, and any thing in action, and any other right or interest.

(2) "Land" includes tenements and hereditaments, corporeal or incorporeal; and houses and other buildings; also an undivided share in land.

(3) "Conveyance" includes assignment, appointment, lease, settlement, and other assurance and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of

Interpretation.

"Property."

"Land."

"Conveyance."

"Convey."

any property, or on any other dealing with or for any property; and "convey" has a meaning corresponding with that of conveyance.

"Mortgage."

"Mortgage money."

"Mortgagor."

"Mortgagee."

"Incumbrance."

"Incumbrancer."

(4) "Mortgage" includes any charge on any property for securing money, or money's worth; and "mortgage money" means money, or money's worth, secured by a mortgage; and "mortgagor" includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest or right, in the mortgaged property; and "mortgagee" includes any person from time to time deriving title under the original mortgagee.

(5) "Incumbrance" includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and "incumbrancer" has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof. 49 V. c. 20, s. 3 (1-5).

The definitions here are taken from 44 & 45 V. c. 41 (Imp.), s. 2.

In the Imperial Act, at the end of the definition of "mortgagee," the following further definition occurs:—"and mortgagee in possession is for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property." Which our legislature has omitted.

Cf. these definitions with those in R. S. O. 1887, c. 100, s. 1; and see notes thereunder.

The various meanings that have been assigned to "mortgage" and "incumbrance" may be found collected in Stroud's Judicial Dictionary at pp. 382, 482.

## PART I.

Obligation on mortgagee to transfer instead of re-con-

2 (1). Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or re-conveying, and on the terms on which he would be bound to re-convey, to assign the

Cap. 102.]

mortgagee of the person, as the virtue of this

Assign

The general mortgagor's assignment of the mortgage is thus a legal security for the other persons who are mortgagees or co-mortgagees, or who are re-conveyed to the incumbrancer under him, relating to the delivery by

The same could not be mortgagor or purchaser of the proceeds of a re-convey to

"Where a mortgagor is here (1) (4). Mortgage to the same person was provided that the company each member

(a) Conveyance

(b) Citing for 278 (1865).

(c) Vol. III.

(d) Citing Smith 341 (1847).

(e) Everitt v.

mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act be bound to assign and convey accordingly.

veying.  
Imp. Act,  
44 & 45 V.  
c. 41, s. 15.

*Assignment of mortgage in lieu of re-conveyance:—*

The general effect of this section is to supplement the mortgagor's right to a re-conveyance, by a right to an assignment of the mortgage debt. The law as to re-conveyance is thus stated by Bythewood & Jarman (*a*): "Where a legal security is redeemed by the mortgagor, or by any other person claiming under him as a subsequent mortgagee or otherwise, the mortgagee must surrender, or re-convey the property to the person redeeming, free from incumbrances by the mortgagee, or any person claiming under him, and must deliver up all deeds and documents relating to the property: and, if required, verify such delivery by affidavit" (*b*).

The same authors also say (*c*): "Formerly a mortgagee could not be compelled to assign the security either to the mortgagor or a new mortgagee on redemption, or to a purchaser on payment of the mortgage debt out of the proceeds of a sale of the property; he was merely bound to re-convey to the owner of the equity of redemption" (*d*).

"Where a mortgagor is entitled to redeem":—"Mortgagor is here used in the wide sense mentioned in section 1 (4). Mortgage is also used in its wide sense according to the same section. Thus, in a recent English case (*e*), it was provided in the articles of association of a company that the company should have a first lien on the shares of each member for his debts to the company. This lien was

(*a*) Conveyancing, Vol. III. 4th ed. 1189.

(*b*) Citing for this latter statement, *Weeks v. Stourton*, 11 Jur. N. S. 278 (1865).

(*c*) Vol. III. 4th ed. 962.

(*d*) Citing *Smith v. Green*, 1 Col. 563 (1844); *Dunstan v. Patterson*, 2 Ph. 341 (1847).

(*e*) *Everitt v. Automatic Weighing Machine Co.*, L. R. 1892, 3 Ch. 506.

held to be a charge within the meaning of section 2 (f); and consequently section 15 (g), applied and entitled a shareholder to require the company, on payment of the sum due, to assign the debt and their lien on the shares to his nominee.

*"Of giving a certificate of payment"*:—These words are not in the Imperial Act, but have been inserted in our own, with reference to a section in our Registry Act (h). By section 76 of that Act a certificate in the form prescribed, when registered, "shall be as valid and effectual in law as a release of the mortgage, and a conveyance to the mortgagor, his heirs, etc., of the original estate of the mortgagor."

*"Or re-conveying"*:—*Teevan v. Smith* (i), is a decision on this section which has given rise to considerable perplexity, and at the same time contains much valuable matter; Jessel, M.R.:—"When we come to look at that section it appears to me quite plain what the meaning of it is. We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a re-conveyance on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a transfer of the mortgage security, but were not willing to take a security directly from the mortgagor, dreading intermediate incumbrances. At that time the debt was not transferable, so that a power of attorney was necessary; therefore the old decisions were right, in laying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a

(f) Our s. 1 (4).

(g) Our s. 2.

(h) Formerly R. S. O. 1887, c. 114, s. 69, now 56 V. c. 21 (Ont.), s. 76; Cf. s. 13 of this Act.

(i) 20 Ch. D. 724 (1882).

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third person. Now the difficulty has been got rid of, by making the debt transferable at law, so that no power of attorney is required, and all ground of objection on the part of the mortgagee to transfer the security is taken away. It can do him no harm in any way.

"Then, what are the words of the 15th section of the Act of 1881? It says, 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But, where there are several successive mortgages, the mortgagor can redeem the next to him without redeeming any other; but, if he wishes to redeem any anterior mortgage, he must also redeem all who are between that mortgagee and himself. . . . So that the words 'where a mortgagor is entitled to redeem' really includes every mortgagor, except a mortgagor who is precluded by some special term in his mortgage-deed from redeeming *within a specific time*.

"Then it says, 'he shall have power to require the mortgagee instead of re-conveying,' etc. . . . It is only 'instead of re-conveying.' The section assumes two things: First, that the mortgagee is bound to re-convey to the person applying to him; and secondly, that the transfer is to be instead of a re-conveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word "re-convey" is the proper word to use; it is strictly a re-conveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to re-convey the estate to him; but, if he is paid off by the second mortgagee, he is bound to re-convey to him. The second mortgagee is a mortgagor under the definition of the Act. He is an assign of the mortgagor and

is entitled to redeem. It appears to me that no person can avail himself of the 15th section (*j*), who is not entitled to call for a re-conveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a re-conveyance" (*k*).

In the same case of *Teewan v. Smith*, Lindley, L.J., says: "Then the 15th section says, 'instead of re-conveying;' that is the key to the whole section. The mortgagor there must be some one who has the right to require a re-conveyance. If that be the true view it makes an end of the whole controversy. The second mortgagee seeks to obtain, and has in fact obtained, a re-conveyance; but the mortgagor says, 'No, I will have the first mortgagee transfer the estate to my nominee'. I am of opinion that he has no such right as he claims."

The justness of the above decision, as between the second mortgagee and the mortgagor is unquestionable. But the effect of the decision appears to go further, and to permit the first mortgagee to insist on foreclosing or selling unless paid, and, at the same time, to refuse to transfer or re-convey, except to the second mortgagee. The effect of this is, that no advance can be obtained to pay off the first mortgage without paying off all. This has been remedied by the Conveyancing Act of 1882 (Imp.) (*l*), the provisions of which, however, we have not yet adopted.

If a first mortgagee convey so as to defeat a second mortgagee, of whom he has notice, it seems he will be liable to the second mortgagee (*m*).

(*j*) Our 2nd section.

(*k*) See *Marson v. Cox*, 14 Ch. D. 140 (1879).

(*l*) 45 & 46 V. c. 39, s. 12.

(*m*) See *West London Com. Bank v. Reliance Bldg. Soc.* 27 Ch. D. 187; 29 Ch. D. 954 (1884).

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(a) 26 Ch. D. 567

(o) 44 Ch. D. 162,

(p) 16 O. R. 433

"On the terms":—In *Alderson v. Elgey* (n), John Elgey was tenant for life, under settlement of 12th March, 1861, and, by order of the court of the 27th July, 1883, it was declared that if the mortgaged premises were redeemed by him they were to be held by him upon trusts corresponding with the uses and limitations declared by said settlement.

Chitty, J.: "After that order, John Elgey comes and asks for an order, that Waterson should transfer the mortgage simply to the nominee of John Elgey, and the question is, whether Elgey is entitled to the order.

"Taking the language of the section, I consider the words, 'on the terms on which he should be bound to re-convey' do not refer merely to the amount of principal, interest and costs, but to 'the terms' generally, because if the legislature intended simply to refer to principal, interest and costs, it would have been very easy to say so. On the face of the order of the 27th July, 1883, it appears to me that John Elgey is not entitled to, and could not get, an unconditional re-conveyance, he can only get a re-conveyance on terms. The terms are that the trust should be affixed to the legal estate which he would take on the legal conveyance. It appears, therefore, that any transfer he might propose must be a transfer corresponding with the deed."

In *Smithett v. Heskith*, under the present section (as amended by the Imperial Act of 1882) the conveyance and assignment were ordered to be made to trustees to preserve the rights of certain incumbrancers (o).

On a Canadian case of *Gooderham v. The Traders' Bank* (p) contains some valuable matter on the subject of this section:

(n) 26 Ch. D. 567 (1884).

(o) 44 Ch. D. 162, 163 (1890).

(p) 16 O. R. 433 (1888), *per* Boyd, C.



(a) *As to what covenants may be required in the assignment*:—"So far as the form of conveyancing under this Act is concerned, nothing more can, in my opinion, be insisted on, than the covenant which is usual from trustees, viz.: that against incumbrances. The other covenant as to what is secured by the mortgage is at best of little use. If more is exacted by the mortgagee on redemption than is due, as between him and the mortgagor, there is the right to recover this without a covenant, and the covenant establishes nothing against the mortgagor, who is not a party to the transfer."

(b) *As to the form of the conveyance*:—"The form of the conveyance depends upon the circumstances. In a case where the money was paid by one who had not the whole equity of redemption, Lord Hatherly said it should be drawn in such a manner as that there should be very little difficulty upon the subject afterwards, and there should be expressed on the face of the conveyance a statement of some kind with reference to the exact position of the parties, shewing that the person so redeeming, having only a partial interest, is to hold, subject to the rights of redemption of all the parties who hold other interests: *Pearse v. Morris*, L. R. 5 Ch. at p. 231. See also *Boyd v. Petrie*, 7 Ch. at p. 392. In proper technical shape the instrument should be framed so as to assign the mortgage debt and interest and the full benefit of the securities, collateral and otherwise held for the same, and then to convey the estate subject to such right and equity of redemption as subsists in the premises by virtue of the mortgage transferred."

(c) *The collateral securities*:—"It is of moment to provide for the securities, and refer to them specifically in a schedule, or otherwise, because they might be separated from the mortgage itself, and so give rise to great complications: *Morley v. Morley*, 25 Beav. 253; *Walker v. Jones*.

Cap. 102.]

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L. R. 1 P. C. 50. . . . The securities, when delivered or endorsed, would have to be held by the person redeeming on precisely the same terms as they were held by the bank."

(d) *To whom transfer to be made*:—"I deem it of no importance that this transfer is drawn to the subsequent mortgagee himself, and not to a third person as expressed in the Act. The transferee is to be a nominee of the person redeeming, and, if he chooses to have the transfer to himself the mortgagee cannot object."

(e) *For form of order, see report of same case at p. 445.*

(2) This section does not apply in the case of a mortgagee being or having been in possession.

(3) This section shall have effect notwithstanding any stipulation to the contrary. 49 V. c. 20, s. 7.

*Mortgagee in possession*:—As our Ontario Legislature has omitted the definition of "mortgagee in possession": *quere*, what does that expression mean?

3. (1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Power for mortgagor to inspect title deeds. Imp. Act. s. 16.

(2) This section applies only to mortgages made after the 1st day of July, 1886, and shall have effect notwithstanding any stipulation to the contrary. 49 V. c. 20, s. 8.

*Right of mortgagor to inspect deeds*:—The former rule on the subject-matter of this section, and the extent of that rule are well expressed in *Patch v. Ward* (q): "There can be no doubt of the wisdom of the rule that a mortgagee or purchaser is not bound to produce his title deeds and may resist the production of all deeds which are muniments of title.

(q) L. R. 1 Eq. 439 (1865).

"But this rule does not extend to the mortgage deed itself, as to which different considerations prevail. It is the mortgage deed which conveys the property by way of pledge, and which contains the proviso for redemption by virtue of which the mortgagor is entitled to redeem the property. The mortgage deed, therefore, is as much the evidence of the mortgagor's title to redeem as it is of the mortgagee's estate" (r).

In a recent case, however, where the plaintiff was a director of the mortgagor-company, it was held that the present section (s) did not give him, through that company, a right to see a subsidiary mortgage which was executed since the Act came into force (t).

The *first day of July, 1886*, was the date fixed for the Act 49 V. c. 20 (Ont.), to come into force.

Insurance money.  
Imp. Act,  
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4. (1) All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage. 49 V. c. 20, s. 9.

*Application of insurance money*:—The meaning of this section has been thoroughly worked out by our Court of Appeal in *Edmonds v. The Hamilton Provident and Loan Society* (u):

"The origin of the section appears to be the Imperial 'Conveyancing and Law of Property Act, 1881,' s. 23, s-ss. (3), (4). There is this difference in the language of our Act, which I think should make no difference in the

(r) Cf. *Ex. p. Caldecott, Re White*, Mont. 55 (1830).

(s) Conveyancing Act, 1881, s. 16 : 44 & 45 V. c. 41 (Imp.).

(t) *Burn v. London and South Wales Coal Co.*, W. N. 1890, at p. 209.

(u) 18 A. R. 367 (1891).

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construction: the former reads: 'All moneys received on an insurance effected under the mortgage deed or under this Act'; while our Act is, 'All money payable under an insurance to a mortgagor.' The clause in the English Act is found in connection with many special provisions as to the mortgagee's power to insure, which are not in our Act, and which were substituted for those of Lord Cranworth's Act (1860), 23-24 V. c. 145.

"The latter were not adopted by us until 1879, 42 V. c. 29, and are retained in s. 18 of R. S. O. (1887) c. 102.

"So far as sub-section 1 is concerned it was, with us at least, merely declaratory of the mortgagee's right under the 'Metropolitan Building Act,' 14 Geo. III. c. 78, s. 83: *Stinson v. Pennock*, 14 Gr. 604; *Curr v. Fire Assurance Association*, 14 O. R. 487 (*v*).

"It gives the mortgagee the right, where an insurance is effected by the mortgagor, even where there is no covenant on his part to insure, or a covenant to insure merely, but not to assign the policy, to require the money to be applied by him in making good the loss or damage (*w*).

"Sub-section 2 confers on the mortgagee a new right, namely, the right to require that all moneys received on an insurance (possibly only an insurance effected under the mortgage) shall be applied in or towards the discharge of the money due under the mortgage.

"The salvo in this sub-section, 'without prejudice to any obligation to the contrary imposed by law,' seems to have lost its significance, now that the Metropolitan Building Act is 'not to be deemed to be in force with regard to property in this Province': The Insurance Act, R. S. O. (1887), c. 167, s. 155, (50 V. c. 26, s. 154). An obligation imposed by special contract means, I think, a special contract in relation to the insurance."

(*v*) Cf. *Ex parte Gorely*, 4 D. J. & S. 477 (1864).

(*w*) *Lees v. Whiteley*, L. R. 2 Eq. 143 (1866) cited and considered as no longer law.

*Rights of mortgagee to insurance moneys*:—From the above case of *Edmonds v. Hamilton Provident*, we may conclude that the mortgagee has three principal rights with regard to the insurance moneys.

1st. He may require the insurance moneys to be applied towards reinstating the property injured.

2nd. He may require the insurance moneys to be applied towards the discharge of moneys due under the mortgage.

3rd. He may hold the insurance moneys as collateral security in lieu of the property destroyed (*x*).

*Insurance moneys held as collateral*:—It seems that if he holds the moneys as collateral, he is still entitled to receive his interest (*y*), and instalments of principal without abatement, and to pursue his other remedies (*e.g.*, distress) in case of default (*z*); until, at any rate, the debt is reduced to an equality with the insurance money, when he must apply the latter *pro tanto*, from time to time, to subsequently maturing payments. The insurance moneys held as collateral should be invested, and the mortgagee is accountable for the profits (*a*).

It is left doubtful whether, in case the mortgagee elects to apply a portion of the insurance money to the over-due moneys, he would be under any obligation to apply the balance upon any instalment thereafter falling due (*b*). It seems, however, that, while the mortgagee is not compelled to apply the moneys to the payment of the principal and interest as they accrue, neither, on the other hand, has he

(*x*) *Ib.* at pp. 349, 357, 368.

(*y*) *Ib.* at p. 356, citing *Austin v. Story*, 10 Gr. 306 (1863), and other authorities.

(*z*) *Ib.* at p. 369, discussing *Corham v. Kingston*, 17 O. R. 432 (1889). This latter case is referred to in *Barber v. Clark*, 20 O. R. 522 (1890).

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the right to apply the moneys to principal and interest not yet due (c).

*Can mortgagees consolidate for purpose of absorbing insurance moneys?*—In the recent case of *Re Union Insurance Company (d)*, there were a first mortgage; a second mortgage to the same mortgagees; and an insurance effected on some buildings, which the second mortgage included over and above what the first included. The policy (taken out by a purchaser of the equity) contained the usual provision: "Loss, if any, payable to the mortgagees, as their interest might appear." Fire having occurred, and there being a surplus of insurance moneys over the sum due on the second mortgage, which was in default; the mortgagees claimed to apply that surplus on their first mortgage, which was also in default. The mortgagees were unsuccessful, the doctrine of consolidation not being applicable to this case (e).

For further notes on Insurance in relation to mortgages, see under c. 107, clause 12, *infra* (f).

5. (1) There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, covenants to the effect in this section stated, by the person, or by each person, who conveys, as far as regards the subject-matter, or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the

Covenants to be implied.  
Imp. Act, s. 7.

(c) *Ib.* at p. 369.

(d) 23 O. R. 627 (1893), citing *Corham v. Kingston*, 17 O. R. 434; *Frontenac Loan Co. v. Hyslop*, 21 O. R. 577; *Edmonds v. Hamilton Provident and Loan Society*, 18 A. R. 367; *Howes v. The Dominion Fire and Marine Ins. Co.*, 8 A. R. 649; *Anderson v. The Saugeen*, 18 O. R. 355; *Mitchell v. City of London Ass. Co.*, 15 A. R. 262; *Cummins v. Fletcher*, 14 Ch. D. 711.

(e) In a case where the policy read:—"Loss, if any, payable to B. . . . his interest therein being as mortgagee," B. was held entitled to bring action on the policy in his own name: *Brush v. Aetna Insurance Co.* 1 Old. 459 (1864).

(f) See further *McKenzie v. Aetna Insurance Co.*, Russ. Eq. Dec. 346 (1879), case where mortgagor insured on his own account and refused to assign policy; *Troop v. Mosier*, Russ. Eq. Dec. 189; *Wyman v. Imperial Fire Ins. Co.*, 20 N. S. R. 487 (1887), how far mortgagee can sue on policy issued in name of mortgagor; *Gaskin v. Phoenix Ins. Co.*, 6 All. 429 (1866), where mortgagee insures his interest, effect of foreclosure or release of equity.

persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say :

On mortgage, by beneficial owner.

(a) In a conveyance by way of mortgage, the following covenants by the person who conveys, and is expressed to convey as beneficial owner (namely) :

For payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage ;

Good title ;

Right to convey ;

That, on default, the mortgagee, shall have quiet possession of the land ;

Free from all incumbrances ;

That the mortgagor will execute such further assurances of the said lands as may be requisite ; and

That the mortgagor has done no act to incumber the land mortgaged ;

Rev. Stat. c. 107.

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B. to The Act respecting Short Forms of Mortgages.

The danger of using this ready-made style of conveyancing is illustrated by an English case, *Ex parte Stanford* (g): A bill of sale was given by which the grantor purported to assign the chattels "as beneficial owner." The Imperial "Bills of Sale Act of 1882" provides (s. 9) that a bill of sale "shall be void unless made in accordance with the form in the schedule to this Act annexed." The result of the use of the words "as beneficial owner" was to import into the bill of sale the covenant in section 7, par. (c), of the Imperial Conveyancing Act of 1881 (h). The Court, therefore, found itself "compelled to say, that the importation of such a covenant into the bill of sale would give to the bill of sale a legal effect beyond that

(g) 18 Q. B. D. 259 (1886).

(h) Corresponding to our present section, par. (a); our legislature, however, having adopted the short form covenants.

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involved in the use of the simple scheduled form." Accordingly, the bill of sale was declared void.

- (b) In a conveyance by way of mortgage of leasehold property, the following further covenant by the person who conveys, and is expressed to convey, as beneficial owner (namely):

On mortgage of leaseholds, by beneficial owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void, or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in the lease, or grant, and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed, up to the time of conveyance;

Validity of lease.

And also, that the person so conveying, or the persons deriving title under him, will, at all times, as long as any money remains on the security of the conveyance, pay, observe and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements, contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all accidents, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him, or them, by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them. 49 V. c. 20. s. 13 (1 c. d.).

Payment of rent and performance of covenants.

6. In a mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenants on their part shall be deemed to be joint and several covenants by them; and where there are more mortgagees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums; in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him. 49 V. c. 20, s. 14 (1).

Implied covenants in mortgages are joint and several.  
Imp. Act, s. 28.



*Joint and several covenants*:—Addison says (i): "Of joint and several liabilities *ex contractu*, 'Each party to a joint contract,' observes Parke, B., 'is severally liable in one sense, *i.e.*, if sued severally, and he does not plead an abatement (j), he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper in effect comprises the joint bond of all and the several bonds of each of the obligors' (k). It may be laid down as a general rule that, wherever several persons agree to perform a particular act, they are bound, jointly and not severally, in the absence of express words creating a several liability.

"If two or more persons, who have joined together in a contract, 'covenant severally,' or become 'severally bound,' it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate bond on the same parchment (l).

"If A. lets land to B. and C., and they covenant, jointly and severally, with the lessor, to pay the rent, or the like, they are sureties for each other for the due performance of the contract: and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a common thing (m).

"*More mortgagees than one*":—The utility of the clause in section 6 as to *more than one* mortgagee will be chiefly manifest in partnership law, where it is of importance both to the partners and to their creditors, to be able to determine what is to be regarded as partnership

(i) Law of Contracts, 9th ed. 300 (1802).

(j) See our C. R. 414.

(k) King v. Hoare, 13 M. & W. 505 (1844).

(l) Citing Newton v. Blunt, 3 C. B. 681 (1846); Beaumont v. Greathead, 2 C. B. 494 (1846).

(m) Citing Enys v. Donnithorne, 2 Burr, 1190 (1761).

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(o) 1 Gr. 159 (1856)

(p) 1 S. & S. 369

property (otherwise called "joint estate"), and what is to be regarded as the separate property of each partner (n).

See our C. R. 345, as to bringing both joint and separate claims against the same defendant.

7. The preceding two sections apply only to mortgages made after the 1st day of July, 1886. 49 V. c. 20, ss. 13 (6), 14 (2). Application of ss. 5, 6.

The first day of July, 1886, was the date for 49 V. c. 20, to come into force.

8. Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor, or his assignee, a release of the equity of redemption in such property, or may purchase the same under any judgment, or decree, or execution, without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property. R. S. O. 1877, c. 99, s. 1. Mortgagee of freehold property, etc., may receive release, etc., without merger of debt.

9. In case such prior mortgagee, or his assignee, acquires the equity of redemption of the mortgagor in the manner aforesaid, no subsequent mortgagee, or his assignees, shall be entitled to foreclose or sell such property without redeeming, or selling, subject to the rights of such prior mortgagee, or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption. R. S. O. 1877, c. 99, s. 2.

Where mortgagee acquires equity of redemption, subsequent mortgagee not entitled to foreclose or sell property without redeeming, etc.

10. The preceding two sections shall not affect any priority or claim which any mortgagee may have under the Registry Laws. R. S. O. 1877, c. 99, s. 3.

Priority under Registry Laws not to be affected.

*Merger of securities*:—In the Canadian case, *Emmons v. Crooks* (o), where a third mortgagee, who took his mortgage without notice of the second mortgage, obtained an assignment to himself of the first mortgage after he had notice of the second, and then purchased the interest of the mortgagor, it was held, following the case of *Parry v. Wright* (p), that the first and third mortgages had merged, and that the second was the only existing incumbrance.

(n) See *Lindley on Partnership*, 5th ed. Book III. c. 4.

(o) 1 Gr. 159 (1850).

(p) 1 S. & S. 369 (1823).

*Origin of present sections*:—In the following year after this decision appeared the original of these present sections with the preamble: "Whereas it is expedient that relief should be afforded to mortgagees of freehold and leasehold property in certain cases in which they are not sufficiently protected by law" (g).

It is noticeable that the original sections contained the dangerous clause: "or to purchase the same under any power of sale in his mortgage;" which was expunged by 39 V. c. 7, (Ont.).

*Comparison of our law with that in England*:—In *Elliott v. Jayne* (r), Spragge, V.C., says: "It is to be observed that the law in Canada goes further in allowing the owner of an estate to keep alive a charge upon it, than does the law in England. It allows that which both Sir William Grant and Sir J. S. Knight Bruce agreed could not be done in England—namely, that one purchasing an equity of redemption can set up a prior mortgage of his own: and it is quite in accordance with the principle of our law to hold that the purchaser of an equity of redemption, not being an incumbrancer, may get in a mortgage and hold it against subsequent incumbrancers."

*Release of equity not a merger*:—In *Hart v. McQuestin* (s), the mortgagee took a release of the equity, the consideration being the amount of principal and interest, "and in satisfaction thereof." Nevertheless, it was held, under the Act (14 & 15 V.), that the security of the first mortgagee was not thereby merged, and, that the only relief a subsequent incumbrancer was entitled to, was that of redeeming the first mortgagee (t).

(g) 14 & 15 V. c. 45 (Can.).

(r) 11 Gr. 415 (1865).

(s) 22 Gr. 133 (1875).

(t) In said case are discussed *Buckley v. Wilson*, 8 Gr. 566 (1861); *Elliott v. Jayne*, *supra*; *Finlayson v. Mills*, 11 Gr. 218 (1865); *Barker v. Eccles*, 17 Gr. 635 (1870); and other cases. See also *Beaty v. Gooderham*, 13 Gr. 317 (1867). Cf. the Manitoba case, *Dean and Chapter St. John's v. MacArthur*, 3 W. L. T. 179 (1892).

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(y) 32 Beav. 24

*How long is mortgage debt kept alive?—In Weaver v. Vandusen (u), Spragge, C., says: "Sections 1 & 2 of c. 99, R. S. O. (v), define the position of a mortgagee who has acquired the equity of redemption. . . . I do not know whether it has been determined, that under the concluding words of section 2 the mortgage debt is kept alive only for such time as it would have been kept alive as against the mortgagor, if the assignee has not acquired the equity of redemption. It is not necessary to determine the point in this case."*

*Effect of purchase by mortgagee at sheriff's sale.—While the purchase by a mortgagee at a sheriff's sale of the equity will not merge the mortgage debt as against a subsequent incumbrancer yet it will do so as against the mortgagor. Thus R. S. O. 1887, c. 64, s. 24 (w), says: "But, in the event of the mortgagee becoming the purchaser, he shall give to the mortgagor a release of the mortgage debt." The effect of this provision is considered in Woodruff v. Mills (x), as being to work a satisfaction of the mortgage.*

*Extent to which doctrine of merger affected:—The effect of this legislation is to abolish the doctrine of merger only as between prior and subsequent incumbrancers. The general doctrine is not affected.*

This general doctrine may be found in *Tyrwhitt v. Tyrwhitt (y)*, where Sir John Romilly, M.R., says: "The rule is this:—*Prima facie* the charge merges in the inheritance, but the presumption may be rebutted if it be shewn that the intention of the owner of the charge was, that it should not merge. Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance, at

(u) 27 Gr. 480 (1880).

(v) Our present sections 8 & 9.

(w) 12 V. c. 73 (Can.).

(x) 20 U. C. R. 51 (1860).

(y) 32 Beav. 249 (1863).

the time when he became entitled to the absolute interest of the charge. First, any actual expression of that intention; secondly, when the form and character of the acts done are only consistent with the keeping the charge on foot; and thirdly, such an intention may be presumed, when, though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance."

In *North of Scotland Mortgage Co. v. Udell* (z), Hagarty, C.J., says:—"From all the authorities I gather, that in the simple case of the mortgagee taking a conveyance of the equity of redemption the ordinary presumption is, that the charge, as against the mortgagor, is merged or incapable of being enforced, at least so as to call for evidence to shew a contrary intent or result" (a).

*Rule as to merger*:—The whole rule on the subject of merger (except as relates to the priorities of two incumbrancers) is briefly put by Osler, J., in *North of Scotland Mortgage Co. v. German* (b): "Whether there was a merger of the mortgage debt is a question of intention. What the intention of the parties was, is a question of fact" (c).

In proceedings for foreclosure, etc., state of mortgage account may be proved *prima facie*, by statement on oath of assignee of mortgagee.

11. On any proceeding for foreclosure by or for redemption against an assignee of a mortgagee, the statement of the mortgage account, under the oath of such assignee, shall be sufficient *prima facie* evidence of the state of such account, and no affidavit or oath shall be required from the mortgagee or any intermediate assignee denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies by oath or affidavit the correctness of such statement of account. R. S. O. 1877, c. 99, s. 4.

(z) 46 U. C. R. 511 (1882), citing *Tyrwhitt v. Tyrwhitt* *supra*; *Hood v. Phillips*, 3 Beav. 513 (1841); *Forbes v. Moffatt*, 18 Ves. 384 (1811), and other

(a) Followed in *British & Can. L. & I. Co. v. Williams*, 15 O. R. 360 (1888).

(b) 51 U. C. C. P. 355 (1880).

(c) For further information on the subject of merger, see *Macdonald v. Bullivant*, 10 A. R. 582 (1884); *Pegg v. Hobson*, 14 O. R. 272 (1887); *Cameron v. Gibson*, 17 O. R. 233 (1889).

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*Mortgage account proved by oath of assignee*:—This section, also, appears originally in 14 & 15 V. c. 45 (d). In the same year appears a provision rendering a party to a civil proceeding a competent witness (e).

*Rights of assignee of mortgage*:—*Bickerton v. Walker* (f) is an instructive case on the position of an assignee of a mortgage: "But it has been argued before us, that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that in the ordinary course of business, a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of account between mortgagor and mortgagee. The reason of this course of conduct is, however, in our opinion, to be found in the fact, that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor. But, in the present case, the assignment was made very soon after the execution of the mortgage, and before the time of payment had arrived; so that, whilst it was possible it was not probable, that any payment would have been made, either of principal or interest; and, we are of opinion, that if an assignee is willing to take the risk of any payment having been made after the date of the mortgage, he is not guilty of carelessness or negligence, if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor, as to the real bargain carried into effect by the mortgage deed, upon the

(d) Section 4.

(e) 14 & 15 V. c. 66. ss. 1 & 2.

(f) 31 Ch. D. 158 (1885).



possession of that deed by the mortgagee, and, upon the receipt for the full amount of the mortgage money under the hand of the mortgagor" (g).

Executors  
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12. Where a person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the legal estate in the land; and such executor, or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the person having the legal estate. R. S. O. 1877, c. 99, s. 5. See also Rev. Stat. c. 110, s. 16.

*Origin of section*:—This section is taken from 32 V. c. 10 (Ont.), s. 2. That enactment omits the words "or leasehold" after "freehold"; adds the words "or on receipt of the consideration money for the assignment," and the word "assign" after "may convey"; and substitutes the words "the estate" after "exonerating" (instead of "the whole"); but, in other respects, is identical with 14 & 15 V. c. 7 (Can.), s. 8.

The origin of this legislation is the Imperial Act, 7 & 8 V. c. 76, s. 9, which is represented in Canada by 12 V. c. 71, s. 9. The form of that enactment shews what the object and necessity of it was: "When any person entitled to any freehold land by way of mortgage has, or shall have, departed this life, and his executor or administrator is, or shall be, entitled to the money secured by the mortgage, and the legal estate in such land is, or shall be, vested in the heir or devisee of such mortgagee, etc."

(g) Following *Rice v. Rice*, 2 Drew, 73 (1853).

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The object then was, to enable the party entitled to receive the mortgage money to re-convey the legal estate to the mortgagor, instead of having to obtain the signature of the heir-at-law or other custodian of the legal estate.

This section 9 was repealed by the above Act of 14 & 15 V., and its place supplied by section 8 of that Act, which, in turn, was superseded by the present enactment as already shown above.

*Leaseholds ; how affected :—*The word "leasehold," in 14 & 15 V. was quite unnecessary, as there was no occasion, in case of a mortgage of leaseholds, to re-convey any "legal estate," the same being vested in the lessor or owner of the reversion.

*Assignment of mortgage by executors :—*The words authorizing the assignment of a mortgage which have already been mentioned as inserted by 32 V. c. 10, were intended to obviate a difficulty that arose in *Robinson v. Byers* (h), where the plaintiff claimed to be the assignee of the executors of the mortgagee and as such sought foreclosure. The Chancellor (Vankoughnet) objected that the statute (i), while giving power to release or convey the legal estate, did not give any power to sell or assign it.

*Sale of mortgage by executors :—Macbeth v. Macbeth* is a case bearing on the subject of sale, by executors, of mortgages :—Where an executor sold a mortgage given to the testator, taking the purchaser's notes payable to himself or order, it was held that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession (j).

*Bequest of indebtedness on a mortgage :—*A rather interesting point arose in *Archer v. Severn* (k). The facts

(h) 9 Gr. 572 (1862).

(i) C. S. U. C. c. 87, s. 5; 14 & 15 V. c. 7, s. 8.

(j) 26 U. C. R. 549 (1867).

(k) 12 O. R. 615, 14 A. R. 723 (1888).



were:—J. S. directed his executors to cancel and entirely release the indebtedness of his son W. S. upon a mortgage made by him to the testator, such release to operate and take effect immediately on and from the testator's death. W. S. was also indebted to the testator on a promissory note and for goods to the amount of about \$3,740. W. S. demanded a discharge of the mortgage from the executors, and they refused the same, claiming to be entitled to payment of the other indebtedness before giving a discharge. The finding of the court (*l*) was in favour of W. S. It was also held, following *Northey v. Northey* (*m*), that, though at law the assent of the executor is necessary to the vesting of a specific legacy (in this case the bequest of indebtedness being a specific legacy), yet in equity he will be decreed to deliver it, being considered there as a bare trustee. In other words, if an executor (as in this case) refuse his assent without cause, he may be compelled to give it (*n*).

*Discharge, by executor, of mortgage by himself to estate:*  
—In *Beaty v. Shaw* (*o*), F. and W. were executors, and F., to secure a debt owing by him to the estate, executed a mortgage to W. After W.'s death intestate, F. sold the mortgaged land to M., and executed a discharge as sole surviving executor. It was held that the discharge had not the effect of releasing the land.

Certificate of payment, etc., to be valid, at whatever time given.

Rev. Stat. c. 114.

13. Every certificate of payment or discharge of a mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators, or assigns, or any one of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with *The Registry Act*, be valid, to all intents and purposes whatsoever. R. S. O. 1877, c. 99, s. 6. See also Rev. Stat. c. 110, s. 17; c. 114, ss. 69, 72.

(*l*) Burton, J.A., dissenting.

(*m*) 2 Atk. 77 (1740).

(*n*) 12 O. R. at p. 622.

(*o*) 14 A. R. 600 (1888); 13 O. R. 21.

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*Scope of this section*:—This section has been deemed of such importance by the Revisors of our Ontario Statutes that they have inserted it in another place; R. S. O. 1887, c. 110, s. 17. Its meaning, which at first sight would seem alarmingly wide, is really very much restricted by the words "*if in conformity with the Registry Act.*" The certificate of discharge, according to that Act, must be executed by the person "entitled by law to receive the money and to discharge the mortgage," and must be in the form of Schedule L to that Act or to the like effect (p).

"*Be valid to all intents and purposes whatsoever*" :—This is explained by the last portion of section 76 of the Registry Act (p):—

"And the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns or any other person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

The mortgagor, or other party entitled to redeem, is not obliged to accept the statutory discharge, but may insist on having at his own expense a reconveyance of the mortgaged lands, including a covenant against incumbrances (q).

If the mortgagor is satisfied to take the statutory discharge, he must see that it is registered if he wishes it to operate as a reconveyance (r). It is not the execution merely of the certificate of discharge, but that and the registration together which amount to a reconveyance (s); and the reconveyance takes effect from the day of registration (t).

(p) Formerly R. S. O. 1887, c. 114, s. 69; now 56 V. c. 21 (Ont.), s. 76; see also ss. 77-79.

(q) *McLennan v. McLean*, 27 Gr. 54 (1879).

(r) *Re Moore*, 8 P. R. 471 (1878); see this case for effect of disclaimer by mortgagee, and of consent of his solicitor.

(s) *In re Music Hall Block*, 8 O. R. 225 (1884); cf. *Lee v. Morrow*, 25 U. C. R. 604 (1866).

(t) *Imperial Bank v. Metcalfe*, 11 O. R. 467 (1886).

Formerly it was a distinct advantage to a new mortgagee or purchaser to retain the discharge of the old mortgage in his vault, for he might, at any time before registering the discharge, obtain an assignment of the satisfied mortgage (*u*), in case such assignment might be found necessary to protect him against mesne incumbrancers (*v*).

The discharge until its registration operates merely as a receipt (*w*), and not being under seal, does not operate an estoppel (*x*).

The statutory discharge is a conveyance of considerable power; it seems the discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail (*y*).

The mortgagor cannot defeat his conveyance of the equity by paying off the mortgage debt and getting a certificate to that effect and registering it; he would strengthen the title of his assignee, not defeat it (*z*).

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14. (1) Where in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares—the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those

(*u*) Under s. 2 of this Act.

(*v*) See *Trust & Loan Co. v. Gallagher*, 8 P. R. 97 (1879). But see 56 V. c. 21, s. 76.

(*w*) *Ib*.

(*z*) *Bigelow v. Staley*, 14 U. C. C. P. 276 (1864).

(*y*) *Lawlor v. Lawlor*, 10 S. C. R. 194 (1881); but see *Carter v. Grassett*, 14 A. R. 685 (1888), and *Booth v. Alcock*, L. R. 8 Ch. 663 (1873).

(*z*) *Lee v. Howes*, 30 U. C. R. 292 (1870). See further, on the subject of discharge of mortgage, the cases cited under the Registry Act, s. 76; also, *Smith v. Elliott*, 25 Gr. 598 (1878); *Imperial Bank v. Metcalf*, 11 O. R. 467 (1886), as to presumptions where deed and discharge registered the same day; *Dilke v. Douglas*, 5 A. R. 63 (1880), as to discharge by surviving mortgagee.

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persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3) This section applies only to a mortgage, or obligation, or transfer made after the 1st day of July, 1886. 49 V. c. 20, s. 15.

15. The *bona fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the trust or security. R. S. O. 1877, c. 99, s. 7. See also Rev. Stat. c. 110, s. 8.

Receipts of mortgagee, etc., to be effectual discharges.

*Effect of section 14:*—Section 14 has had a certain effect on the law as existing in England, but it is not so easy to see what effect it has had on the law in Ontario, which already was greatly in advance of the English law. It is our duty, however, to try and explain the state in which the law has been left, after the introduction of the present section into our statutes, which introduction was effected by the wholesale adoption of clauses from the Imperial Conveyancing Act of 1881, with little or no regard to what the Ontario statutes already declared.

To begin with, there are well known in law two ordinary ways in which more than one person may hold property together, namely, as tenants in common and as joint tenants. Now the estate of joint tenancy is chiefly distinguished from the other estate by its characteristic of

survivorship. This peculiarity of survivorship has the advantage of simplifying the transfer of property, but is considered inequitable as between beneficial owners.

*With regard to purchases, etc.*:—Our legislature has, except in the case of trustees, considered the estate of joint tenancy as a thing not to be favoured. Accordingly we have a section as follows:—

“Where by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants.” (a).

*With regard to mortgages*:—Whether or not a mortgage would be included in the word assurance in the preceeding section, there is no doubt that in equity the courts in construing mortgages leaned to tenancies in common. Thus in *Morely v. Bird* (b) we find the Master of the Rolls saying: “So if two people join in lending money upon a mortgage, equity says it could not be the intention that the interest in that should survive. Though they take a joint security each means to lend his own and take back his own. But that was never extended to grants.”

Now this equitable doctrine renders it very inconvenient to a mortgagor to take a loan from more than one lender; as in the case of the death of either he is put to the trouble of finding out the representatives of the deceased to pay them as well as the survivor, instead of merely having to deal with the survivor alone.

This has been remedied in Ontario in a very extensive manner as we learn from *Dilke v. Douglas* (c): “We have

(a) R. S. O. 1887, c. 108, s. 20.

(b) 3 Ves. 631 (1797).

(c) 5 A. R. 76 (1880).

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already quoted the terms of section 9 of chapter 90, C. S. U. C. (12 V. c. 71, s. 10) (*d*), upon which the appellants mainly rely. It will be remembered that it makes the *bona fide* payment to, and receipt by, the survivor of several mortgagees or the executors or administrators of such survivor, an effectual discharge to the person paying the same from the duty of seeing to the application or being answerable for the misapplication thereof. This clause was borrowed from a corresponding one in the Imperial Act, 7 & 8 V. c. 76, which, however, was repealed by 8 & 9 V. c. 106, and it was after this repeal that the mortgage under adjudication in *Matson v. Dennis*, 10 Jur. N. S. 461 was made. This repeal was no doubt due to the considerations pointed out by Mr. Bellenden Ker, in his well known letter to the Lord Chancellor. In his opinion the real inconvenience to be remedied arose in the case of the death of one of the several trustees who had lent money upon a mortgage. We may quote the passage from the letter which contains his comments upon the provisions with which we are now concerned: 'It was to remove this inconvenience that the clause in question was framed; but it goes far beyond the evil in question, by making the receipts of the survivor of *all* mortgagees who are at law joint tenants sufficient. Now in practice many persons not trustees, etc., take securities in joint tenancy; and it would seem very inexpedient thus to repeal generally the salutary equitable rule as regards these securities, and to allow the survivor to possess himself of the whole funds without the concurrence of the representatives of the other equitable tenant in common.' The prompt repeal of the section proves that this view of its inexpediency prevailed with Parliament. But our Legislature must have thought that different considerations were applicable to the circumstances of this country, for the clause was enacted here four years

(d) Our present section 15.



after its repeal in England. We apprehend that there is no doubt that the construction which Mr. Bellenden Ker indicates is the correct one. The surviving mortgagee could already have given a receipt valid in a court of law; the statute freed the person paying from any equitable obligation to see to the application of the money. Thus the survivor became, as far as the person paying was concerned, the person entitled, both at law and in equity, to receive the money and to give an effectual discharge from the debt. To that we must then couple the 60th section of 32 V. c. 10 (e), which makes a registered certificate, executed by the person entitled by law to receive the money and discharge the mortgage, as valid and effectual in law as a release of such mortgage and a conveyance to the mortgagor. It is impossible to draw any other conclusion than that the registration of a certificate given by the survivor upon payment of the debt, effectually discharges the mortgage and reverts the legal estate. The whole tenor of the statutory regulations excludes the supposition that the survivor was authorized to receive the money and discharge the debt without being empowered to reconvey the legal estate."

*Change effected by section 14.*—Now what does the present section 14 add to this state of the law? A good deal of the phraseology of that section is explained by reference to a very common clause inserted by English conveyancers in mortgages to trustees, somewhat as follows:—"Witnesseth that in consideration of the sum of <sup>now</sup> paid to the said mortgagor by the said mortgagees (*out of money belonging to them on a joint account*), the receipt whereof is hereby acknowledged, etc." This form of clause is an expedient by which trustees (1) obtain the advantage of survivorship, and (2) do not disclose the

(e) His Lordship meant the 60th section of 31 V. c. 20; R. S. O. (1887) c. 114, s. 69; now 56 V. c. 21 (Ont.), s. 76.

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trust (*f*) which disclosure would, in equity, render the mortgagor liable to see to the application of his payments.

Both the sufficiency of the receipt of the survivor and the non-liability to see to the application of payments have been secured to the mortgagor in England by the Conveyancing Act of 1881 (*g*), sections 36 and 61; the latter being our present section 14 (*h*). But as both these same privileges are already secured in Ontario by the present section 15, what new right has section 14 added in this Province?

To answer this question, let us again refer to the judgment in *Dilke v. Douglas* (*i*):—"But the statute (*j*), in terms only refers to the *bona fide* payment of money. It does not expressly extend its protection to a mortgagor who, instead of actually paying the debt, chooses to enter into some different arrangement for securing it. It is urged that the substituted mortgage being ample security, it is equivalent to payment, but we do not feel at liberty to place such an extended construction upon the statute. Its natural and obvious import is that the relaxation of the doctrine of equity shall be confined to cases of actual payment of money, and there is nothing either in the words or the spirit of the legislation which would warrant us in giving the same effect to the acceptance of another security as to a receipt of money."

Now the last clause in section 14, sub-section (1), certainly is more liberal than section 15 as interpreted above, for it makes the receipt in writing of the survivor a complete discharge. So that in this respect something has been added by the introduction of section 14.

(*f*) As to the importance of which non-disclosure even now, see Bythewood & Jarman, Conveyancing, 4th ed., Vol. III. pp. 849, 997.

(*g*) 44 & 45 V. c. 41 (Imp.).

(*h*) 49 V. c. 20, s. 15, which came into force 1st day of July, 1886.

(*i*) 5 A. R. at p. 77 (1880).

(*j*) Present section 15.



To summarise:—A. The receipt of any surviving mortgagee (or his representative) with *bona fide* payment to him is an effectual discharge. B. The receipt of a surviving mortgagee (or his representative) under a mortgage containing a "joint account" clause (*k*), is a complete discharge whether the payment is in money or in some other form.

The provisions of 22 & 23 V. c. 35 (Imp.), s. 23, and 23 & 24 V. c. 145, s. 139, which correspond to our present section 15, and which like that section only related to the payment of *money*, have been repealed by the ampler provision in section 36 of the Conveyancing Act of 1881 (*l*).

*Will courts go behind "joint account" clause*:—The use of the words "as between them and the mortgagor or obligor," in section 14, is to be carefully noted; for it has been decided that while the court will not go behind the "joint account" clause when dealing with the rights of the mortgagor, yet as among the mortgagees themselves the court will go behind that clause and look into the real nature of the transaction (*m*). Thus in *Re Jackson, Smith v. Sibthorpe* (*n*), the court, notwithstanding the evidence that the effect of the joint account clause was explained to the mortgagees, held that they were tenants in common. As it was very cleverly put in the argument in this latter case. "The joint account clause is mere conveyancing machinery, its object being only to facilitate the dealing with the property, and though a purchaser may not be entitled to go behind it, it is not conclusively binding on the persons interested in the money."

Right of mortgagee to distrain,

16. The right of a mortgagee to distrain for interest in arrears upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as

(*k*) Such as already given above.

(*l*) 44 & 45 V. c. 41 (Imp.).

(*m*) *In re Harman & U. R. Ry. Co.* 24 Ch. D. (1883).

(*n*) 34 Ch. D. 732 (1887).

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are not exempt from seizure under execution. This section shall not apply to mortgages existing on the 25th day of March, 1886. 49 V. c. 29, s. 3.

17. (1) As against creditors of any mortgagor or person in possession of mortgaged premises under a mortgagor, the right, if any, to distrain upon the mortgaged premises for arrears of interest or for rent, in the nature of or in lieu of interest under the provisions of any mortgage to be executed after the 23rd day of April, 1887, shall be restricted to one year's arrears of such interest or rent, but this restriction shall not apply unless some one of such creditors shall be an execution creditor, or unless there shall be an assignee for the general benefit of such creditors appointed before lawful sale of the goods distrained, nor unless the officer executing such writ of execution, or such assignee shall, by notice in writing to be given to the person distraining, or his attorney, bailiff, or agent, before such lawful sale, claim the benefit of the said restriction, and in case such notice is so given, the distrainer shall relinquish to the officer or assignee the goods distrained, upon receiving one year's arrears of such interest or rent and his reasonable costs of distress, or if such arrears and costs shall not be paid or tendered he shall sell only so much of the goods distrained as shall be necessary to satisfy one year's arrears of such interest or rent and the reasonable costs of distress and sale, and shall thereupon relinquish any residue of goods, and pay any residue of moneys, proceeds of goods so distrained, to the said officer or assignee.

(2) Any officer executing a writ of execution, or an assignee who shall pay any money to relieve goods from distress under the next preceding sub-section, shall be entitled to reimburse himself therefor out of the proceeds of the sale of such goods.

(3) Goods distrained for arrears of interest or rent, as aforesaid, shall not be sold except after such public notice as is now required to be given by a landlord who sells goods distrained for rent. 50 V. c. 7, ss. 36-38.

*Distress and Attornment*:—There are two somewhat similar powers that have been commonly inserted in mortgages with a view to affording the mortgagee a speedy mode of enforcing the payment of his interest, instead of his being put to the necessity of taking possession of the premises by means of an ejectment. These two powers are: (1) a power of distress for arrears of rent (*o*); and (2) an attornment clause (*p*).

(*o*) A mere power of distress may be given in a mortgage without creating a tenancy, *Chapman v. Beecham*, 3 A. & E. N. S. 723 (1842).

(*p*) See *Bythewood & Jarman* 4th ed. Vol. III. 980.

limited as to goods.

Mortgagee's right of distress limited to one year's interest or rent.

Reimbursement of officer or assignee.

Notice of sale.

*Operation of section 16*:—Section 16 seems intended to deal with the simple power of distress. We find that view taken of it in *Edmonds v. Hamilton Provident & Loan Society* (q), where it is said: "Then as to the seizure of Leslie Edmonds' goods. If the distress was *for interest simpliciter* under the terms of the mortgage, the clause authorizing the distress would amount to a license only, and would not warrant the seizure of the goods of a stranger. That was always the law, although there was at one time some difference of opinion on the subject, and I think that the clause to be found in the Act respecting Mortgages, R. S. O. (1847) c. 102, s. 16, must be confined, as its language plainly imports, to distresses of that kind, and though perhaps unnecessary, was intended *ex abundante cautela* to remove doubt upon the subject" (r).

*Attornment clause*:—An attornment clause may be of either of two kinds: (1) it may be a mere sham, a mere contrivance and device to give the mortgagee an additional benefit in the event of the mortgagor's bankruptcy (s), or (2) it may be a *bona fide* contract for the creation of the relation of landlord and tenant between the mortgagee and mortgagor (t).

This distinction has been fully discussed in our Supreme Court in *Hobbs v. Ontario Loan and Debenture Company* (u).

"The reality of the tenancy between mortgagor and the defendant company depends in the first place on the sufficiency of the lease as a matter of conveyancing and in the next place on the *bona fides* of the transaction.

(q) 18 A. R. 347, 350 (1891); *Corham v. Kingston* 17 O. R. 432 (1889), considered.

(r) Cf. *Freeman v. Edwards*, 2 Exch. 732 (1848).

(s) *Ex parte Williams*, 7 Ch. D. 143 (1877).

(t) *Ex parte Voisey*, 21 Ch. D. 453 (1882). See *Trust & Loan Co. v. Lawrason*, 6 A. R. 286 (1881).

(u) 18 S. C. R. 542 (1890); approving *Superior Loan & S. Co. v. Lucas*, 44 U. C. R. 106 (1879).

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"The latter point has usually been tested in England in the light of the bankruptcy law. Here we have no bankruptcy law at present, but it does not therefore follow that the intention with which the lease is made is to be disregarded. Creditors may be taken advantage of in other ways than those expressly forbidden by the bankruptcy laws, and the right to challenge one of these leases is not confined to creditors. Some of the ordinary incidents of the relation of landlord and tenant are fitted to produce injustice, and the person affected by them must have the right to question the reality of the relationship. A notable example is the right to distrain the goods of a stranger, which still exists in Ontario though modified by statute, R. S. O. 1887, c. 102, ss. 16, 17.

"*Kearsley v. Phillips (v)* is an instance of the exercise of that right under the attornment clause in a mortgage, and in the case *Re Willis (w)* one of the lord justices refers to that power as a reason why an attornment is more beneficial to a mortgagee than a mere power to enter and distrain (x).

"It cannot be denied that a mortgagor competent to contract will be bound by whatever bargain he voluntarily makes with his mortgagee, and in attorning tenant to him, may if he please, agree to pay him rent at a higher rate than a stranger would be likely to give for the premises, but when the question is whether there is an honest intention to create the relationship of landlord and tenant or whether a tenancy is absolutely created in order to cover some other purpose, we can properly, and without interfering with the freedom of contract, consider the terms of the lease as a part of the evidence bearing on the fact of intention."

(v) 11 Q. B. D. 621 (1883).

(w) 21 Q. B. D. 384, 395 (1888).

(x) See also *Daubuz v. Lavington*, 13 Q. B. D. 347 (1884), *Hall v. Comfort*, 18 Q. B. D. 11 (1887), as to effect of attornment, on the practice of indorsing writs.

Section 17 is evidently intended to apply to the case where a *bona fide* relation of landlord and tenant has been created by the mortgage. This we may infer from the third sub-section which requires the same public notice of sale by a mortgagee as by a landlord; and from the close similarity of section 17 to section 42 of the Imperial Bankruptcy Act, 1883, by which it seems to have been suggested (*y*). The effect of both enactments is to limit the right, which the mortgagee-landlord had of distraining all goods found on the premises, to one year's arrears of rent or interest, in cases where creditor's pursuing their remedies would be prejudiced by such distress (*z*).

*Disadvantages of an attornment.*—An attornment clause, while it has the advantage over a mere distress clause in respect to the seizure of the goods of strangers, has certain disadvantages; of which the chief is the risk that such a clause will render the mortgagee liable (as mortgagee in possession) to account as against subsequent incumbrancers for rent received or which but for wilful default might have been received (*a*).

*Attornments to two mortgagees.*—Following the analogy of *Ex parte Punnett* (*b*), we may say that an attornment to a second mortgagee is not invalid because of a prior attornment to a first mortgagee: and if the amount of the rents fixed by the two attornment clauses is a fair rent of the property, valid distresses may be levied by both mortgagees under their attornment clauses. Of course, such distresses will be subject to the present section 17.

(*y*) 46 & 47 V. c. 52 (Imp.) s. 42.

(*z*) See *Ex parte Hill*, 6 Ch. D. 63 (1877); *Ex parte Williams*, 7 Ch. D. 138 (1877). But the mortgagee is in a rather worse position than the landlord: see *In re Lancashire Cotton Spinning Co.*, 35 Ch. D. 656 (1887).

(*a*) *Re Iron Furnace Co.*, 10 Ch. D. 356 (1879). But see *Stanley v. Grundy*, 22 Ch. D. 478 (1883).

(*b*) 16 Ch. D. 226 (1880); following *Morton v. Woods*, 4 L. R. Q. B. 293 (1869).

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*Forms of distress and attornment clauses:*—There are innumerable shades of difference in these, but it may be useful to give a few general examples:—

*Distress clause:*—The form in clause 15 in the schedule to the Act respecting Short Forms of Mortgages is a distress clause, and has been construed as a mere license to take the goods of the mortgagor (c).

*An attornment clause* is in some such form as the following:—“And for the consideration aforesaid, the mortgagor hereby attorns and becomes tenant from year to year (d) to the mortgagee of the premises hereby conveyed, or so much and such part or parts thereof as are in the occupation of the mortgagor at the yearly rent of                   dollars, clear of all deductions, to be paid by equal half yearly payments on the                   day of                   and                   day of                   in every year (i.e., the days fixed for payment of interest) during the continuance of this security” (e).

*Sham attornment:*—As an extreme example of a sham attornment, *Ex parte Williams* (f) may be instanced; the mortgage was to secure £55,000, the rent reserved was £20,000; “it was clearly intended only as a sham rent” (g).

(c) *Trust & Loan Co. v. Lawrason*, 6 A. R. 286 (1881); *Klinck v. Ontario Industrial Loan Co.*, 16 O. R. 565 (1888).

(d) See *In re Threlfall*, 16 Ch. D. 274 (1880).

(e) For form in cases of mortgage by joint tenants and tenants in common, see *Ex parte Parke*, L. R. 18 Eq. 381 (1874).

(f) 7 Ch. D. 138 (1877). Cf. *Ex parte Jackson*, 14 Ch. D. 725 (1880).

(g) The attornment clause is not intended to enable mortgagee to repay himself the capital advanced: *Hampson v. Fellows*, L. R. 6 Eq. 575 (1868). As to effect of Bills of Sale Acts on attornment clauses, see *Mumford v. Collier*, 25 Q. B. D. 279 (1890).

## PART II.

Part II. of this Act represents Part II. of Lord Cranworth's Act (*h*), which part has been repealed in England by the Conveyancing Act, 1881 (*i*) and its place supplied by sections 19 *et seq.* of the last mentioned enactment. Even after such repeal in England it has been held that in the case of a mortgage executed before 1881, the powers under Lord Cranworth's Act can be exercised since 1881 (*j*).

As we have elsewhere more fully discussed the subject of Power of Sale in a work specially devoted to that branch of law (*k*), we may refer the reader to said work for further information besides what properly can be inserted under the succeeding sections of this Act.

Powers incident to mortgages.

18. Where any principal money is secured or charged by deed executed after the 11th day of March, 1879, on any hereditaments of any tenure, or on any interest therein, the person to whom the money shall, for the time being, be payable, his executors, administrators, and assigns, shall at any time after the expiration of [six] months from the time when the principal money shall have become payable according to the terms of the deed, or after any interest on the principal money shall have been in arrear for six months, or after any omission to pay any premium or any insurance, which by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely :

1st. A power to sell, or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner.

(*h*) 23 & 24 V. c. 145 (Imp.) ss. 11-24.

(*i*) 44 & 45 V. c. 41, 2nd Schedule, Part III.

(*j*) *Re Solomon & Meagher's Contract*, 40 Ch. D. 508 (1889).

(*k*) *Treatise on Power of Sale* (1892) ; *The Carswell Co. (Ltd.)*.

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2nd. A power to insure, and keep insured, from loss or damage by fire, the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for such insurance to the principal money secured at the same rate of interest. 42 V. c. 20, s. 1.

The 11th day of March, 1879, is the date of assent to 42 V. c. 20 (Ont.), by which Part II. of the present Act was originally enacted in Ontario. There are two powers contained in the present section, which are entirely distinct and which we may deal with separately in this order: 1st, the power of sale; 2nd, the power to insure.

1. *Power of Sale*:—The period of default after which sale may be had under this Act has been undergoing a gradual diminution. Thus Lord Cranworth's Act, section 11 reads, "at any time after the expiration of *one year* from the time when such principal money shall have become payable;" 42 V. c. 20 (Ont.) *i. e.* the present section 18, replaced *one year* by *six months*; still later, The Mortgage Amendment Act, 1888 (*l*), has replaced *six months* by *four months*.

The period for arrears of interest is still *six months* as in Lord Cranworth's Act.

2. *The power to insure*:—This power is to come into force "after any omission to pay any premium or any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge." But in Ontario the usual insurance clause in accordance with which such premium "ought to be paid" is based on clause 12 in the schedule to the Short Forms of Mortgages Act (*m*); and as the latter part of that clause vests a fuller power in the mortgagee to insure than that conferred by this section; and as according to section 29 of this Act such a power already existing in the deed pre-

(*l*) 51 V. c. 15 (Ont.) s. 3. See at the end of Part II. for text of this Act.

(*m*) R. S. O. 1887, c. 107.



cludes the operation of the power conferred by the present section, the result is that the power to insure under the present section is a matter of very little consequence or value.

Receipts for purchase money sufficient discharges.

19. Receipts for purchase money given by the person or persons exercising the power of sale by the preceding section conferred, shall be sufficient discharges to the purchaser, who shall not be bound to see to the application of such purchase money. 42 V. c. 20, s. 2.

Compare this section with section 15 preceding; and see notes thereunder.

Notice before sale.

20. (1) No sale as aforesaid shall be made until after [three] months' notice in writing has been given to any subsequent incumbrancer, and to the person entitled to the property subject to the charge and to such incumbrance, the notice to be given either personally or at his usual or last place of residence in this Province, which notice may be given at any time after any default in making a payment provided for by the deed.

(2) In case of the death of the person entitled subject to the charge, and of his interest therein passing to infant heirs or devisees, the notice shall be given as aforesaid to his executors or administrators, as well as to his heirs or devisees, as the case may be.

(3) The notice for an infant heir is to be served upon his guardian, and is also to be served upon the infant himself, if over the age of twelve years. 42 V. c. 20, s. 3.

Section 12 of Lord Cranworth's Act had *six months'* notice: this section has *three months'* notice; which in turn has been shortened to *two months'* notice (n).

The words "to any subsequent incumbrancer and to the person entitled," etc., leave no doubt as to notice being due to the "assigns" of the mortgagor. The words "either personally or at his usual or last place of residence" contain an ambiguity. "*His*" may be taken to refer to "the person entitled to the property," so that posting up a notice (or leaving it) at the mortgagor's residence may be taken to be good service on the "assigns" (o).

(n) 51 V. c. 15 (Ont.), s. 3; for text see at end of Part II. of this Act.

(o) See *Major v. Ward*, 5 Ha. 598 (1847); *O'Donohue v. Whitty*, 2 O. R. 430 (1883).

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The words "*at any time after any default*" allow the notice to run concurrently with the period of default.

*Notice to executors, etc.*:—Difficulties may arise in this connection where no administrators have been appointed (*p*).

The notice of notice to an infant heir (sub-section 3) was suggested by the absurdity of the then, and (apart from this Act) present condition of the law on this subject. This condition of the law has been stated in *Bartlett v. Jull* (*q*) where the mortgagee served the widow and the administratrix of the mortgagor,—with a notice addressed to her as widow,—instead of serving the party properly entitled, a child of three years. The sale was set aside as he had served a person who "had nothing to do with the matter."

21. When a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power has been improperly or irregularly exercised, or that no such notice as aforesaid has been given; but any person damaged by any such unauthorised, improper, or irregular exercise of such power, shall have his remedy against the person selling. 42 V. c. 20, s. 4.

Improper sale not to defeat title of purchaser.

This is the latter portion of section 13 of Lord Cranworth's Act. The object of the enactment is to prevent the setting aside of sales on account of irregularities in the sale proceedings. The section does not go so far however as to protect a purchaser who is aware of such irregularities.

22. The notice of sale may be in the following form or to the following effect:

Form of notice.

I hereby require you on or before the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ (a day not less than three calendar months from the service of the notice, and not less than six months after the default), to pay off the principal money and interest secured by a certain indenture dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and expressed

(*p*) See *Parkinson v. Hanbury*, L. R. 2 H. L. 18; *Aylward v. Lewis*, L. R. (1891), 2 Ch. 87.

(*q*) 23 Gr. 140 (1880).

to be made between (here state parties and describe mortgage property), which said mortgage was registered on the day of (and if the mortgage has been assigned add : and has since become the property of the undersigned). And I hereby give you notice that the amount due on the said mortgage for principal, interest, and costs respectively, is as follows : (set the same forth).

And unless the said principal money and interest and costs are paid on or before the said day of , I shall sell the property comprised in the said indenture under the authority of the Act entitled An Act respecting Mortgages of Real Estate. Dated the day of 18 .  
42 V. c. 20, s. 5.

This may be noted as one of the meritorious features of the present enactment, namely, that it indicates what will be considered a proper form of notice of intention to sell the mortgaged property.

Registration of notice.

23. The notice of sale of lands may be registered in the registry office of the registry division in which the lands are situate, in the same manner as any other instrument affecting the land, and such registration shall have the same effect, and the duties of the registrar in respect of the same shall be as in the case of any other registered instrument, and the fee to be paid such registrar for registering the same shall be fifty cents.  
42 V. c. 20, s. 6.

Affidavit for registration.

24. (1) The affidavit for the purpose of registering the notice shall be made by the person who served the same, and shall prove the time, place, and manner of such service, and that the copy delivered to the registrar is a true copy of the notice served.

Certified copy of registered notice to be evidence.

(2) A copy of such registered notice and affidavit, certified under the hand and seal of office of the registrar, shall, in all cases be received as *prima facie* evidence of the facts therein stated. 42 V. c. 20, s. 7.

These provisions as to registry are provisions that should be extended to all cases of the exercise of a power of sale, whether under this Act or otherwise. The sale papers in cases to which this Act does not apply, may be deposited with the Registrar under R. S. O. 1887, c. 115, but such deposit does not improve the value of such sale papers as evidence (r).

(r) R. S. O. 1887, c. 115, s. 10.

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25. The money arising by a sale effected as aforesaid shall be applied by the person receiving the same, as follows: First, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the subsequent encumbrancers according to their priorities, and the balance to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be. 42 V. c. 20, s. 8.

Application of purchase money.

Section 14 of Lord Cranworth's Act does not contain the provision for payment to the subsequent incumbrancers according to their priorities. Of course the payment to the *assigns* of "the person entitled to the property subject to the charge" may be taken as covering subsequent incumbrancers; but it is better to distinctly recognize the rights of the subsequent incumbrancers as regards the surplus. These incumbrancers are those already discovered by the preliminary searches made by the vendor under power (*s*); and any others who may notify and prove their claims to him.

Failing, subsequent incumbrancers known to him, the mortgagee may pay over the surplus to the person entitled to the property, subject to the charge under which sale was had. Payment may have to be made to the mortgagor,—to a subsequent purchaser,—or to an assignee in insolvency (*t*), as the case may be. In any event, in the absence of notice to the contrary, the mortgagee is entitled to pay over the surplus to the apparent owner of the equity of redemption (*u*).

26. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the

Conveyance to the purchaser.

(*s*) See *Re Abbott v. Medcalf*, 20 O. R. 299 (1891); *Bloor v. Bank of U. C.* 20. S. 31 (1844).

(*t*) Cf. *Calloway v. Peoples*, 54 Ga. 441.

(*u*) *Harper v. Culvert*, 5 O. R. 152 (1884).

purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of. 42 V. c. 20, s. 9.

There have been several decisions under section 15 of Lord Cranworth's Act; to which this present section corresponds:

In *Re Solomon Meagher's Contract (v)*, an equitable mortgage was created by deed, containing an agreement that, when called upon, the mortgagor would execute to the lenders a legal and proper mortgage with power of sale and all other powers, provisoes, and agreements usually contained or inserted in mortgages. The mortgagees contracted to sell the premises under the power of sale in Lord Cranworth's Act, and an application was made under the *Vendor and Purchaser Act* to determine, whether being equitable mortgagees they could make an effectual conveyance. It was held that they could.

Where there was a mortgage, by demise, of leaseholds it was held that the mortgagee could, under section 15, sell the lease to a purchaser (*w*).

Owner of charge may call for title deeds and conveyance of legal estate.

27. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made. 42 V. c. 20, s. 10.

(*v*) 40 Ch. D. 508 (1889).

(*w*) 19 W. R. 694 (1871). See further *Re Hodson & Howes*, 35 Ch. D. 668 (1887), a case under the Convey. Act, 1881; and *Re Richardson*, L. R. 12 Eq. 308; 13 Eq. 142 (1871), for effect of section 15, where the mortgagor was registered with an indefeasible title under 25 & 26 V. c. 53 (Imp.), s. 17.

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(x) R. S. O. 1 (y) Ferguson

28. The mortgagee's costs may, without an order, be taxed by one of the taxing officers or by the local master, at the instance of any party interested. 42 V. c. 20, s. 11. Taxation of costs.

*Taxation of costs of sale*.—Section 28 is somewhat indefinite on the point whether such taxation may take place after the mortgagee's costs have actually been paid to the solicitor.

Independently of section 28 the matter is dealt with in the Act respecting solicitors (*x*), sections 42-46, which makes special provision for the case where a person, not being chargeable as the principal party *is liable to pay, or has paid*, any bill, etc. The effect of section 28 is to dispense with the necessity for an order.

Section 28 is not expressly or clearly limited to the powers conferred by the present Part II. It has been held to apply to mortgages made before, as well as after, its enactment (*y*).

29. So much of Part II. of this Act as provides for a power to sell shall not apply in the case of a deed which contains a power of sale; and so much of this Act as provides a power to insure shall not apply in the case of a deed which contains a power to insure, nor shall any of the provisions of Part II. of this Act apply to any deed which contains a declaration that Part II. of this Act is not to apply thereto. 42 V. c. 20, s. 12. Provisions as to sale, etc., not to apply in certain cases.

This is a most unfortunate section; as it is chiefly in cases where the mortgage already contains express powers, which for some reason turn out to be unavailable, that the implied powers given in Part II. of this Act would be called into use. The 32nd section of Lord Cranworth's Act and the 19th section of the Conveyancing Act, 1881, are both more liberal in this respect; the statutory power taking effect subject to the special stipulations in the deed.

Here may be conveniently inserted two amending Acts relating chiefly to powers of sale.

(*x*) R. S. O. 1887, c. 147.

(*y*) *Ferguson v. English & Scottish Investment Co.*, 8 P. R. 404 (1881).

## 51 VICT. CAP. 15 (ONT.).

An Act to amend the law respecting Mortgages.

[Assented to 23rd March, 1888.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title. 1. This Act may be cited as The Mortgage Amendment Act, 1888.

Application of section. 2. (1) This section shall only apply to mortgages made subsequent to the first day of July, 1888.

Payment of principal after default. (2) Where default has been made in the payment of any principal money secured by any mortgage according to the terms and conditions thereof, the same may be paid at any time thereafter without previous notice to the person entitled to receive the same, and without the payment of any interest in lieu of such notice; provided always, that if in or by the said mortgage or otherwise there has been any express agreement with respect either to such notice or to interest to be paid in lieu thereof, such agreement shall be binding and have the same effect as if this Act had not been passed; provided moreover, that this Act shall not be held as applying to any default in the payment of principal money that may have become due or payable only by reason of some default made in the payment of interest money secured or payable by or under any such mortgage, or by reason of some default made in the payment of any instalment of principal money, or any portion of any instalment of principal money secured or payable by or under any such mortgage, but shall be held as applying to any such instalment in respect of which default has been made as aforesaid.

Mortgages made prior to 1st July, 1888, not affected. (3) Any rule, question or matter of law or equity affecting or arising out of any default in the payment of money secured by any mortgage made either heretofore or prior to the first day of July next after the passing of this Act, shall in all respects, and for all purposes, be adjudged and determined as if the provisions of this section had not been enacted.

*Change effected by 51 V. c. 15 (Ont.):*—The law previous to this enactment may be stated as follows:—

A mortgagee whose money was not paid on the day appointed by the mortgage was entitled to six calendar months' notice previously to being paid (z). This was a

(z) *Harmer v. Priestly*, 16 Beav. 571 (1853).

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(a) *Browne v.*  
(b) *Banner v.*  
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Eq. 176 (1871); *Pe*

(c) *Bartlett v.*

(d) *Day v. Da*

H. R. P. S.—



practice resting upon custom; and the custom is founded on this, namely, that it is but fair that the party who has lent his money upon the security, should have a reasonable opportunity, before the transaction is put an end to, of finding some other security on which he may lay out his money when it has been repaid to him (a). It afterwards became the practice to treat six months interest in advance as equivalent to six months notice.

*When mortgagee not entitled to notice:*—It seems that when the mortgagee gives notice demanding payment, or takes proceedings for the recovery of the money (which is equivalent to a demand) previous notice was (and is) not requisite (b).

It was held, however, that the rule requiring notice or interest applied where the mortgagee gave a notice requiring payment on a particular day, if the money was not then paid (c).

The consent of the mortgagee, during an administration suit, to the sale amounted to acceptance by him of notice to pay off and he was not entitled to six months interest in lieu of notice, but only interest for the period which intervened between the actual payment off and the expiration of the six months from the time of such consent being given (d).

The effect of the present enactment is of course to dispense with the notice, or interest in lieu of notice, hitherto required when default was made in the payment of the *principal* as it fell due.

*1st Proviso:*—The effect of this proviso is to allow any express agreement by the parties on the subject of notice

(a) *Browne v. Lockhart*, 10 Sim. 424 (1840).

(b) *Banner v. Berridge*, 18 Ch. D. 254 (1881); *Matson v. Swift*, 5 Jur. 645 (1841), followed in *R. v. Houston* 2 O. R. 81 (1882); *Letts v. Hutchins*, L. R. 13 Eq. 176 (1871); *Paynter v. Carew*, 18 Jur. 417 (1854).

(c) *Bartlett v. Franklin*, 15 W. R. 1077 (1867).

(d) *Day v. Day*, 31 Beav. 270 (1862).



to be binding. Doubtless, unless the express agreement disclosed a contrary intention, the former rule would apply, that when the mortgagor sought to pay, some notice, and when the mortgagee called in the money, no notice would be required.

*2nd Proviso* :—The sense of this proviso is not so plain as could be desired; but the evident intention is to deal with what are called *acceleration clauses*. Thus there is generally a clause in a mortgage such as "Provided in default of the payment of the interest hereby secured, the principal hereby secured shall become payable" (e). Properly this clause is enforceable only at the option of the mortgagee (f); but to remove any misapprehension the legislature has inserted the second proviso, the effect of which is as follows :—

(1) When an instalment of principal has fallen due, the mortgagor may, after default, without notice, etc., pay *that instalment* (not the whole principal).

(2) The default of some interest, or of an instalment or portion of an instalment of principal, gives no right to pay off the whole principal without notice, etc., unless the mortgagee has definitely exercised his option of acceleration.

Rev. Stat.  
c. 102, ss.  
18 and 20  
amended.

3. Section 18 of The Act respecting Mortgages of Real Estate, being chapter 102 of the Revised Statutes of Ontario, 1887, is hereby amended by substituting the word "four" for the word "six," in the sixth line thereof; and section 20 of the said Act is hereby amended by substituting for the word "three," in the second line thereof, the word "two."

See sections 18 and 20 above.

Power of  
sale.

4. Whenever a mortgage made in pursuance of The Act respecting Short Forms of Mortgages, being chapter 107 of the Revised Statutes of Ontario, 1887, contains a power of sale in the form No. 14, in column 1 of schedule B to the said Act, the mortgagee, his heirs, executors, administrators or assigns may:

(e) R. S. O. 1887, c. 107 Sched. B. clause 15.

(f) Cf. *Cruso v. Bond*, 1 O. R. 384; 9 P. R. 111 (1881).

Cap. 102.]

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in exercising the said power, in lieu of taking the proceedings provided for by the said form No. 14, column 2, take proceedings under and have the benefit of the provisions of part two of The Act respecting Mortgages of Real Estate, chapter 102 of the Revised Statutes of Ontario, 1887, except that such power shall not be exercisable until after at least four months' default and at least two months' notice, or such longer periods as may by the power contained in such mortgage be fixed therefor, and the said part two shall apply to a sale made under such power.

53 VIC. CAP. 27 (ONT).

An Act to amend the Law respecting Powers of Sale in Mortgages.

[Assented to 7th April, 1890.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Section 4 of The Mortgage Amendment Act, 1888, is amended by adding thereto the following sub-sections :

51 V. c. 15,  
s. 4, amended.

(2) Whenever a mortgage, purporting to be made in pursuance of The Act respecting Short Forms of Mortgages, being chapter 107, Revised Statutes of Ontario, 1887, contains a power of sale which provides for a sale without notice, the mortgagee, his heirs, executors, administrators or assigns may take proceedings to sell under and sell and have the benefit of the provisions of part two of The Act respecting Mortgages of Real Estate, as fully and effectually as if the mortgage had not contained a power of sale.

Proceedings  
under power  
of sale in  
mortgages.

Rev. Stat.  
c. 102.

(3) The preceding sub-section shall be held to apply to all mortgages whether heretofore or hereafter made.

2. *Effect of above sections*.—These enactments are intended to amend the law as elucidated in *Re Gilchrist and Island (g)*.

To summarize the effect of our enactments, we may say :—

1. That on four months' default (as to principal or six months' default as to interest), there is a power of sale

(g) 11 O. R. 537 (1836). See *infra* under R. S. O. 1887, c. 107, clause 14.

—after certain proceedings mentioned in Part II. above—in any mortgage *not containing an express power of sale* ;

2. That in any mortgage made in pursuance of the Short Forms Act, and containing a power according to the form therein, the above power of sale may be exercised optionally ; and

3. That, when in a mortgage *purporting* to be made in pursuance of the Short Forms Act, there is a *power of sale without notice*, the mortgagee may exercise the above power as if none other existed ; but

4. That, where the mortgage does not purport to be made in pursuance of the Short Forms Act, and yet contains a power of sale that for some reason is not safely available, there is no such power of sale implied as above ; and also

5. That, where the mortgage does purport to be made in pursuance of the Short Forms Act, but its power of sale clause is excluded from the benefit of that Act for some other reason than the excision of the provision for notice, there is no such power of sale implied as above.

51 VIC. CAP. 15 (ONT.) CONTINUED.

Time for  
questioning  
sales  
limited.

5. No sale heretofore made shall be declared to be invalid on the ground or by reason only of the same having been made in pursuance of a power of sale contained in a mortgage where such power has been exercised by an assignee of such mortgage instead of the original mortgagee unless within two years after the making of any such sale, proceedings have been or shall be taken to declare the same to be invalid or irregular ; but nothing herein contained shall be deemed or construed to confirm any such sale which for any other reason or any other ground might be set aside, or declared irregular or invalid ; nor shall anything herein contained affect any proceeding, suit, or matter, either now pending or heretofore adjudged or determined, or which may be brought within three months after the passing of this Act.

30. (1) In vexatious cases that, where a mortgage either required to be secured by a deed under a mortgage, not such mortgage provision therein mortgaged shall which, according to moneys is to be proceeded upon order permitting from the Judge Court.

(2) Such order affidavits and proof and equitable things allowed to be taken.

(3) Such affidavit

"In the matter between (described bearing date on the

(4) This section or other injury to application there 47 V. c. 16, s. 2.

"Pursuant a mortgage :— for notice be which this statute the execution clause limiting executed, it is condition or provision to which any

## CAP. 102—PART III.

30. (1) In order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted that, where pursuant to any condition or proviso contained in a mortgage there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage, or declaring an intention to proceed under and exercise the power of sale contained in such mortgage, no further proceedings and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or the lands or any part thereof thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the moneys is to be made, or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same shall first be had and obtained either from the Judge of a County Court or from a Judge of the High Court.

(2) Such order may be obtained *ex parte*, but only upon such affidavits and proof as will satisfy the judge that it is reasonable and equitable that the proposed action or proceeding should be allowed to be taken and proceeded with.

(3) Such affidavit or order may be entitled as follows:—

“In the matter of a mortgage purporting to be made between (describing the parties thereto as in the mortgage) and bearing date on the                      day of                      .”

(4) This section shall not apply to proceedings to stay waste or other injury to the mortgaged premises, and the costs of any application thereunder shall be in the discretion of the judge.  
47 V. c. 16, s. 2.

When demand of payment made or notice of intention to exercise power of sale given, no further proceedings to be taken until expiration of time named in notice or demand, without order of a judge.

Proof on which order may be granted.

Title of affidavit or order.

This section not to apply to proceedings to stay waste, etc.

“Pursuant to any condition or proviso contained in a mortgage:—This means that the mortgage must provide for notice before this section applies: “The Act upon which this statement of defence is based, was passed after the execution of these mortgages; but as there is no clause limiting its application to mortgages subsequently executed, it is applicable to the present case if there is any condition or proviso contained in these mortgages pursuant to which any demand or notice requiring payment, or

declaring an intention to proceed under and exercise the power of sale has been made" (h).

"*No further proceedings* :—An advertisement announcing that the mortgaged land will be offered for sale, is a "further proceeding": "I am of opinion that the advertisement complained of is a proceeding within the meaning of the words 'no further proceedings' in s. 30 of R. S. O., c. 102, and that under the circumstances of the case, it is a proceeding that is forbidden by that section. I think the order for the injunction was rightly made for anything that appears here. The order should, I think, be continued as asked till the 24th November" (i). The defendants in this latter case seem in a measure to have been the victims of the Revisors; for 47 V. c. 16, s. 2, has "no further proceedings *at law or in equity*"; and if that phraseology had been allowed to stand it is not certain that an advertisement of sale under power would have been held a proceeding.

The following decision of Dalton, M.C., in *Perry v. Perry* (j) explains itself :—"The notice of sale is dated on 2nd May. The writ was issued on 3rd May. . . . Now this is within the very words of the Act—and its spirit. The notice was dated the 2nd, the writ issued on the 3rd, and both were served on the 3rd. Then a notice has been *given*, and a further proceeding at law *had*, before the lapse of the time mentioned in the notice, and a suit has been commenced before such lapse of time, without any judge's order authorizing the same.

(h) *Canada Permanent v. Teeter*, 19 O. R. 158 (1889); the mortgage in question having a provision for sale without notice.

(i) *Smith v. Brown*, 20 O. R. 166 (1890); an interim injunction had been granted by Galt, C.J., upon the *ex parte* application of the plaintiff.

(j) 10 P. R. 275 (1884). As to multiplicity of actions see further *In re Flint and Jellett*, 8 P. R. 361 (1880); *Hay v. McArthur*, 8 P. R. 321 (1880); *Merchants' Bank v. Sparkes*, 28 Gr. 108 (1880); *Beatty v. O'Connor*, 5 O. R. 731 (1884).

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(k) Cf. *Cruso v.*

"It ought not to be supposed by any one that serving the two papers together could defeat the statute. The very object is to prevent all other proceedings while the notice is running. It is not necessary under the Statute to fulfil the very words of it that one of the acts should be prior to the other. Both acts may be done together and yet the statute be violated. I must set aside the service of this writ, with costs; and I stay all proceedings in this suit upon payment of the debt and interest and of the costs of the writ, but without any costs of the copy or service of the writ, and without allowance of any costs of the notice. The costs of this application to be set off, so far as they will go, against the plaintiff's costs."

31. When such demand or notice requires payment of all moneys secured to be paid by or under a mortgage, the party making such demand or giving such notice shall accept and receive payment of the same if made as required by the terms of such notice or demand; and if there be any dispute as to the costs payable by the person by or on whose behalf such payment is either made or tendered, then such costs shall, on three clear days' notice to such person by the person claiming the same, be taxed and ascertained by the clerk of a County Court, or by a local master, and thereupon and in such case, if within ten days after said costs have been so taxed and ascertained, payment of said moneys and costs are duly made or tendered to the person entitled thereto, or to his solicitor or agent in that behalf, the same shall be deemed and taken to have been paid or tendered, as the case may be, within the meaning of such notice or demand, and in compliance therewith. 47 V. c. 16, s. 3.

Payment to be accepted if made in terms of notice.

Taxation of costs.

This section has several effects:—1. It makes an exercise by the mortgagee of his option to accelerate (*i.e.*, require payment of *all moneys secured*), definite and final (*k*); 2. It effectually settles any claim the mortgagee might possibly have for six months' interest in lieu of notice; and 3. It provides machinery for settling the troublesome and uncertain item called "costs."

(k) Cf. *Cruso v. Bond*, 9 P. R. 111; 1 O. R. 384 (1882).

Purchaser of mortgage may set up defence of purchase for value without notice.

32. The purchaser in good faith of a mortgage may to the extent of the mortgage (and except as against the mortgagor, his heirs, executors, or administrators), set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do. R. S. O. 1877, c. 95, s. 8.

The object of this enactment seems to have been to remove a point of difference that existed among our judges. Thus in *Smart v. McEwan* (l), we find Strong, V.C., saying:—"The plaintiff's equity being established, it binds the defendant, although he took the transfer of the mortgage from Orde without notice and for value; for I adhere to my decision in the case of *Ryckman v. The Canada Life Assurance Company* (m), founder' on the authorities there quoted, that an assignee of a mortgage cannot set up a defence of purchase for value without notice." This view of things was different from that taken by Vankoughnet, C., in *Muir v. Dunnnett* (n), and by Mowat, V.C., in *Totten v. Douglas* (o).

The present enactment came into force in 1876 (p). Since the passing of the enactment there have been several decisions bearing on the subject. In *Wright v. Leys* (q) there was the double defence of purchase for value without notice, and the Statute of Frauds; in *Bridges v. Real Estate Loan and Debenture Company* (r) there was the double defence of purchase for value without notice and of the provision contained in R. S. O. 1887, c. 114, s. 83. *Herchmer v. Elliott* (s) is a case where from the circum-

(l) 18 Gr. 624 (1871).

(m) 17 Gr. 550 (1870).

(n) 11 Gr. 85 (1864).

(o) 15 Gr. 126 (1863); see 18 Gr. 341. See further *London Loan Co. v. Smyth*, 32 U. C. C. P. 530 (1882); *Sanders v. Malsburg*, 1 O. R. 178.

(p) 39 V. c. 7 (Ont.), s. 10.

(q) 8 O. R. 88 (1885).

(r) 8 O. R. 493 (1885).

(s) 14 O. R. 714 (1887).

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stances of fraud in which the assignment of mortgage was originally obtained the court considered it void even in the hands of an innocent purchaser.

"*Except as against the mortgagor,*" etc.—"It has never been seriously supposed that in such a case the assignee could claim by reason of his being a purchaser for value without notice of the real agreement, to hold the mortgagor liable to the full amount of the money consideration stated in the mortgage (*t*)."  
The general rule is that the assignee takes subject to the equities between the *original parties to the mortgage* (*u*).

(*t*) *Pressey v. Trotter*, 26 Gr. 161 (1878); see further *Egleston v. Howe*, 3 A. R. 566 (1879).

(*u*) *Wilson v. Kyle*, 28 Gr. 104 (1880).



R. S. O. 1887, CHAPTER 104.

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contrary intention

(1) "Land" means  
and hereditaments

(2) "Petitioner"  
petitioning by virtue  
made parties to the  
plaintiffs or petitioners

c. 101, s. 2.

## R. S. O. 1887, CHAPTER 104.

### An Act respecting the Partition and Sale of Real Estate.

SHORT TITLE, s. 1.  
INTERPRETATION, s. 2.  
JURISDICTION OF HIGH COURT, s. 3.  
REAL REPRESENTATIVE, s. 4.  
PARTITION COMPULSORY ON JOINT  
TENANTS, ETC., s. 5.  
COURTS IN WHICH PROCEEDINGS MAY  
BE INSTITUTED, s. 6.  
REMOVAL OF PROCEEDINGS, s. 7.  
PETITION FOR PARTITION, FORM OF,  
PARTIES, ETC., ss. 8-11.  
GUARDIANS FOR INFANTS AND PER-  
SONS UNHEARD OF FOR THREE  
YEARS, ss. 12-20.  
INCUMBRANCES, HOW MADE PARTIES,  
s. 21.  
SERVICE OF PETITION:  
IN CASES OF PARTIES IN ONTARIO,  
s. 22.  
IN CASES OF PARTIES UNKNOWN OR  
WITHOUT ONTARIO, ss. 23-27.  
ALLOWANCE OF PETITION, ss. 28-30.  
PLEADING TO PETITION, ss. 31-32.  
TRIAL OF ISSUES, s. 33.

PROCEEDINGS IN DEFAULT OF ANSWER,  
s. 34.  
PETITIONERS TO PROVE TITLE, s. 35.  
PARTITION BY REAL REPRESENTA-  
TIVE, ss. 36-39.  
SALE, WHEN MAY BE HAD AND PRO-  
CEEDINGS, ss. 35, 40-43.  
REFERENCE AS TO INCUMBRANCES,  
ss. 44-46.  
PAYMENT OF INCUMBRANCES, ss.  
47-48.  
PAYMENT TO TENANTS BY THE CUR-  
TESY OR IN DOWER, ETC., ss.  
49-50.  
NOTICE OF SALE, s. 51.  
ESTATES OF MARRIED WOMEN TO BE  
BOUND, s. 52.  
EVIDENCE OF JUDGMENT, s. 53.  
DEED, CONTENTS, EXECUTION, AND  
EFFECT, s. 54.  
APPORTIONMENT OF COSTS, s. 55.  
APPLICATION OF PROCEEDS, s. 56.  
SECURING PURCHASE MONEY, ss. 57-61.  
MISCELLANEOUS, ss. 62-69.

**H**ER MAJESTY, by and with the advice and consent of  
the Legislative Assembly of the Province of Ontario,  
enacts as follows:—

1. This Act may be cited as the "*The Partition Act*" R. S. O. Short title.  
1877, c. 101, s. 1.

2. Where the following words occur in this Act they shall be Inter-  
pre-  
construed in the manner hereinafter mentioned, unless a con-  
trary intention appears—

(1) "Land" and "Lands" shall include lands, tenements, "Land."  
and hereditaments, and all estates and interests therein;

(2) "Petitioner" or "Plaintiff" shall include all parties "Petitioner."  
petitioning by virtue of this Act; and all parties, or those "Plaintiff."  
made parties to the proceedings under this Act (other than the  
plaintiffs or petitioners) shall be defendants. R. S. O. 1877,  
c. 101, s. 2.

Cf. definitions in R. S. O. 1887, c. 100, s. 1, and the notes thereunder.

Jurisdiction of High Court.

3. In regard to the partition and sale of estates of joint tenants, tenants in common and coparceners, the High Court, in addition to the powers hereinafter conferred, shall possess the same jurisdiction as by the laws of England on the 10th of August, 1850, was possessed by the Court of Chancery in England, and also as by the laws in force in Ontario, was possessed by the Courts of Queen's Bench and Common Pleas. R. S. O. 1877, c. 40, s. 53.

The 10th of August, 1850, is the date of "An Act for the more effectual Administration of Justice in the Court of Chancery in Upper Canada" (a). Section 4 of that Act is represented by the present section.

*Equity jurisdiction in partition*:—What the jurisdiction possessed by the Court of Chancery in 1850 was, may be gathered from a passage in Spence's *Equitable Jurisdiction of the Court of Chancery*, published in 1846 (b):—

"The common law of England provided for partition being made between co-heirs, and joint owners in certain cases, and the right was extended by various statutes. The partition was effected by means of a writ directed to the sheriff, who, in obedience to it, ascertained the shares by the verdict of a jury, and then assigned to each his share. The court, by its judgment, confirmed the partition. In former times it seems to have been considered that the party could only obtain actual possession by action; but it was held by C. J. Gibbs that it was the duty of the sheriff to deliver actual possession of each undivided share.

"But the forms of the common law were not well suited to the exercise of this jurisdiction; therefore, some time in or about the reign of Elizabeth, the Court of Chancery also assumed the jurisdiction of making partition through commissioners of its own; making the parties convey to each other in severalty their respective portions. The

(a) 13 & 14 V. c. 50 (Can.).

(b) Vol. I., at p. 654.

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superior facilities offered by the Court of Chancery occasioned numerous applications to be made to that court for commissioners for the partition of estates, even after a partition had been effected at law, where the partition was unequal or had to be corrected. It was usual also to apply here in all cases where infants were concerned. It was soon established in all cases of co-ownership as a matter of right. The proceeding by writ of partition at law, which had gone into desuetude, was wholly abolished by the statute before referred to (c)."

"*As, by the laws in force in Ontario, was possessed:*" *i.e.* was possessed at the time of the Judicature Act, which merged these Courts into the High Court.

"The Court of Common Pleas" for Upper Canada was established in 1849 by 12 V. c. 63, which Act conferred upon the new court the same jurisdiction as that exercised by the Court of Queen's Bench. What the authority of the Queen's (or King's) Bench was in matters of partition will appear from the notes to section 6, *infra*.

4. The Judge of the Surrogate Court in every county shall be the real representative for all real property within the county, in respect of or to which any person being seised of, or entitled to any estate in fee simple therein, dies intestate, and for all other purposes hereinafter mentioned. R. S. O. 1877, c. 101, s. 3.

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Surrogate  
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sentative.

*Real representative* :—The heir-at-law; he represents the real estate of his deceased ancestor (d).

*Necessity for artificial real representative* :—As long as the right of primogeniture existed in Upper Canada, there was very little difficulty in ascertaining the real representative, *i.e.*, the party who could convey with a good title, the real estate of an intestate. Primogeniture in lands held in fee simple, or for the life of another, was abolished in 1851 (e).

(c) 3 & 4 Wm. IV. c. 27 (Imp.), s. 36; 4 Wm. IV. c. 1 (U. C.), s. 39.

(d) Anderson's Dictionary of Law.

(e) 14 & 15 V. c. 6 (Can.); taking effect 1st Jan., 1852.

It was soon found, however, that it was inconvenient to have the estate vested in a group of heirs-at-law, as we learn from the preamble to an Act passed in 1857 (f): "Whereas it frequently happens that in cases of persons dying intestate, leaving real estate in Upper Canada, that by reason of the absence therefrom or of the minority of some of the parties entitled to participate in the succession to such real estate, no title can be made to the same without great delay, expense and inconvenience, and it is desirable to provide some remedy therefor." Accordingly, the substance of the present section was enacted by section 1 of the said Act.

*Duties of real representative*:—The utility and duties of the "real representative" will appear in sections 35 *et seq.* of this Act. Armour, J., in *Murcar v. Bolton* (g) says in this connection: "The statutes, 2 Wm. IV. c. 35, and 20 V. c. 65, appear in the Consolidated Statutes of Upper Canada as c. 86, and by the Consolidated Act the real representative, which by the way is a mere legislative *alias* for the Judge of the Surrogate Court, is made to take the place of the sheriff and freeholders as to the duties to be performed by them under 2 Wm. IV. c. 35."

The Judge of the Surrogate Court is the Senior Judge of the County Court in every County (h).

All parties having interest or lien may be compelled to make partition or sale.

5. All joint tenants, tenants in common, and co-parceners, all doweresses and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties whosoever interested in, to, or out of any lands in Ontario, may be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof, as hereinafter mentioned and provided, and the partition may be had whether the estate is legal or equitable, or equitable only. R. S. O. 1877, c. 101, ss. 4, 7.

(f) 20 V. c. 65 (Can.).

(g) 5 O. R. 172, (1884).

(h) R. S. O. 1887, c. 50, s. 6. See also s. 62, *infra*.

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(i) Cf. *Foster v.*  
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(j) *Boyl. C.*, in  
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For the nature of joint tenancies and tenancies in common, see the notes under R. S. O. 1887, c. 100, s. 5, and c. 102, ss. 6, 14 and 15.

*Improvements by tenants in common or other co-owners*:—While it is true that tenants in common and other co-owners may be made to suffer partition, yet there is a rule as to their compensation for moneys expended on the common property. "No remedy exists for money expended in repairs (or improvements) by one tenant in common, so long as the property is enjoyed in common; but in a suit for partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is decided to put an end to that state of things, it is then necessary to consider what was expended in improvements or repairs; the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the court, one party cannot take the increase in value, without making allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. . . . But if improvements are made before the tenancy in common begins in fact (*i*), *e.g.*, during a prior life tenancy as in this case, then the equitable doctrines attaching to improvements made during tenancies in common do not arise (*j*)."

*Effect of partition on tenancy in common*:—Where a caretaker originally in possession for one of several tenants in common, claimed title by possession, the Court of Appeal held that after a decree in a partition suit in 1866 effecting a severance of the property, the possession of the defendant

(i) Cf. *Foster v. Emerson*, 5 Gr. 135 (1854); see *Workman v. Robb*, 28 Gr. 243 (1881), 7 A. R. 389.

(j) *Boyl, C.*, in *Lusby v. Crewson*, 21 O. R. (1891); cf. *Wood v. Wood*, 16 Gr. 471 (1869); *Biehn v. Biehn*, *Hovey v. Ferguson*, 18 Gr. 498 (1871).

ceased to be that of the plaintiffs (the other tenants in common) and that they could not contend that the defendant was in, as their caretaker. This decision was reversed in the Supreme Court (*k*).

"*Co-parceners or parceners*, a tenancy which arises when an inheritable estate descends from the ancestor to several persons possessing an equal title to it. It arises by act of law only, *i.e.* by descent, which in relation to this subject is of two kinds: (1) Descent by the common law, which takes place when an ancestor dies intestate, leaving two or more females as his co-heiresses; these, according to the canon of real property inheritance, all take together as co-parceners or parceners, the law of primogeniture not obtaining among women in equal relationship to their ancestor; they are, however, deemed to be one heir; and (2) descent by particular custom" (*l*); which particular customs do not exist in Ontario.

The Act abolishing primogeniture in this Province provided that where under its provisions an inheritance or share of an inheritance descends to several persons they shall take as *tenants in common*, in proportion to their respective rights (*m*). Thus apparently several males may take as tenants in common, where females would have taken as co-parceners.

The original enactment (*n*) from which the present section is derived only mentioned the first three classes of interested persons named in the present section; the fuller enumeration was introduced by 32 V. c. 33.

*Tenants for life*:—See sections 8 and 49 and notes thereunder.

(*k*) Heward v. O'Donohoe, 19 S. C. R. 341 (1891).

(*l*) Wharton, Law Lexicon, 7th ed. 198.

(*m*) 14 & 15 V. c. 6, s. 16; now R. S. O. 1887, c. 108, s. 46.

(*n*) 2 Wm. IV. c. 35, s. 1.

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*Tenants by entireties*:—An interesting point arose in *Re Shaver and Hart* (o): Lands had been conveyed to S. H. and A. H., his wife. S. H. predeceased A. H., who died testate. The Judge of the County Court of Middlesex ordered partition as if S. H. and his wife took as tenants in common. It was held, however, on appeal that as husband and wife they took by entireties, and accordingly that upon the death of S. H. the wife had become solely seised of the land. So the shares of the respective parties were ordered to be as directed in the will of A. H.

*All dowresses and parties entitled to dower*:—While dowresses have attempted to take advantage of section 8, *infra*, to force a partition, on the other hand no attempt seems to have been made to force dowresses to a partition by means of this section. R. S. O. 1887, c. 56, provides a tolerably simple method of assigning a widow her dower. It may be well to note, however, that under "The Devolution of Estates Act" (p), a widow may elect to take her interest under that Act in lieu of all claims to dower; in which case she would take one-third absolutely (q), and doubtless could be forced to a partition under this Act.

*Tenancy by the curtesy of England*:—"An estate which by favour of the law of England arises by act of law, and is that interest which a husband has for his life in his wife's fee simple or fee tail estates general or special, after her death. There are four circumstances necessary to the existence of this estate: (1) a canonical or legal marriage, (2) seisin of the wife, (3) birth of issue, alive during the mother's existence, (4) death of the wife" (r). The numerous enactments passed in Ontario with regard to married women's property have rendered the existence of

(o) 31 U. C. R. 603 (1871); followed in *Re Morse*, 8 P. R. 475 (1875).

(p) R. S. O. 1887, c. 108, s. 4 (2).

(q) *Re Reddan*, 12 O. R. 781 (1886).

(r) Wharton, Law Lexicon, 7th ed. 224.

H. R. P. S. — 11



this estate in any particular case a matter of doubt and uncertainty. Such provisions of these enactments and of "The Devolution of Estates Act," and such decisions of our courts as bear upon this matter have been patiently collected and considered by Mr. E. D. Armour in his work on Titles (s), and the conclusion he comes to, except as regards property in settlement (t) is the following:—"If the [*Devolution of Estates*] Act had not been passed, it seems that all property acquired [*by the wife*] under the [*Married Woman's Property*] Act of 1859 would have been expressly subject to curtesy, and all property acquired under the Act of 1872, and perhaps that of 1884, would have been subject to the estate by the curtesy if the wife died intestate. And so, in all these cases the husband apparently may still elect to take his estate by the curtesy and forego all further interest under the [*Devolution of Estates*] Act; but if he does not elect within six months after his wife's death as required by the Act, then "the administrator takes absolutely, and the husband takes his share from him in the course of distribution under the Act" (u).

"*Mortgagees and other creditors having liens:*"—It is not easy at first sight to see what effect this can have on the rights of mortgagees. There is no question that the parties interested in the equity of redemption may partition their interests in any manner they please; but their partition will be subject to the rights of any mortgagee holding the whole land as security for his debt. As an absolute sale by the owner of the equity of a portion thereof would not affect the mortgagee's rights, so neither would the partition by several owners of the equity.

As between the mortgagors and the mortgagees of the whole property no question of shares could arise; the

(s) At p. 147 *et seq.*

(t) As to which, see *Ib.* p. 157.

(u) *Ib.* at p. 156.

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(x) 6 P. R. 145

mortgagee owns the whole, subject to the right of redemption. It may, however, be the case that one of several joint owners has mortgaged his undivided interest (*v*); in which case doubtless his mortgagee would be a necessary party to any partition.

Similarly, the execution creditor of one of several joint owners would be a necessary party to a partition.

The 44th section further provides, in case of *sale*, for ascertaining what creditors have specific liens "on the whole estate, or any undivided interest or estate therein of any of the parties by means of any mortgage," etc. But it is to be remembered that where the mortgagee of the whole estate himself is willing to make a sale, he should be allowed to do so to save the expense of partition proceedings (*w*).

"*And all parties whosoever interested*":—In *Bennetto v. Bennetto* (*x*), Blake, V.C., says: "That Act (*i.e.* "The Partition Act") is only intended to apply to simple cases where some common title in the petitioner and respondents is admitted, and the only question is the extent of the interests of the various parties. The object of an application for the allowance of the petition is to require the petitioner to shew that he was entitled to partition before the case is referred to the Master to ascertain the amount of his share. It is essential in proceeding under this Act that the petitioner should admit some title in the respondents."

For further information on the subject of "*parties interested*" see notes to section 8, *infra*.

"*Whether the estate is legal or equitable, or equitable only*:"—This is inserted in accordance with the spirit of "The Judicature Act." 32 V. c. 33, had the following

(x) Cf. *Laplane v. Scamen*, 8 A. R. 557 (1883).

(x) See *Carroll v. Carroll*, 23 Gr. 438 (1876).

(x) 6 P. R. 145 (1874).

section instead: "38. When the interests in such estate are equitable fees simple, the Court of Chancery alone shall have the same powers upon petition or bill filed in that court, to act thereupon, as are hereby given to the courts of law and equity in other cases, and the same notices shall be given, served, published and verified, guardians of minors appointed, and the same rules apply as to parties; and the like proceedings had as hereinbefore directed."

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6. Where the lands are situate in two or more counties, the proceedings shall be instituted in the High Court, and where the lands are situate in one county only, the proceedings may be instituted in the County Court of the county or in the High Court. R. S. O. 1877, c. 101, s. 5.

*Origin of section* :—The origin of this section is to be found in 2 Wm. IV. c. 35, the preamble to which reads: "Whereas in many cases much inconvenience is experienced from the want of some court competent to order the partition of lands held in joint tenancy, tenancy in common, and co-parceny." Section 1 of the same section enacts:

"That all joint tenants, tenants in common, and co-parceners of any estate or estates in lands, tenements or hereditaments within the Province, may be compelled to make or suffer partition of such estate or estates in manner hereinafter prescribed, and that when such estate or estates is or may be situated in two or more districts, the proceedings under this Act shall be heard before the Court of King's Bench, and when such estate or estates is or may be situated in one district only, the proceedings may be had before the District Court or Court of King's Bench."

The same jurisdiction as that exercised by the Court of King's Bench was afterwards conferred on the Court of Common Pleas (y).

The districts were abolished in 1849 by "An Act for abolishing the Territorial Division of Upper Canada into

(y) See notes to s. 3, above.

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(c) *Re Shaver*,  
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Districts, and for providing for temporary Unions of Counties for Judicial and other purposes, and for the future dissolution of such unions, as the increase of wealth and population may require" (z). Section 3 of said Act made all the laws then applicable to districts, to be thence-forward applicable to counties.

7. The proceedings upon petition, if commenced in a County Court, may at any time before judgment be removed into the High Court by *certiorari*, to be allowed by a Judge of the Court, on security being given by the party applying for the *certiorari*, for the costs of the proceedings on petition, to the satisfaction of the Judge; and upon any final judgment, decree or order, an appeal may be had by any of the parties interested, in the same manner, and with the same consequences, as in other cases of appeal from the decision of any Court rendering such judgment, decree or order. R. S. O. 1877, c. 101, s. 6.

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"An appeal may be had":—"During the argument it was suggested that an appeal did not lie in a special case like this: but on reference to the statute of Ontario respecting partition, 32 V. c. 33 (a), by the 17th and 18th sections (b), provision is made for the stating of a special case, making it up and proceeding to judgment, etc., and by the 37th section, it is provided that upon any final decree or order, or judgment, an appeal may be had by any of the parties interested" (c).

A prohibition to the county judge will lie in a case where he exceeds his jurisdiction under this Act (d).

8. Any party interested in any land in this Province, or the duly authorized agent of such party, or the guardian (duly appointed by a Surrogate Court) of an infant entitled to the immediate possession of any estate therein, may file a petition in any of the Courts aforesaid, praying that partition of such lands may be made, or that the same may be sold under the directions

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(z) 12 V. c. 78.

(a) The present Act, c. 104.

(b) Now the 32nd and 33rd.

(c) *Re Shaver*, 31 U. C. R. 603 (1871). See further *Furness v. Mitchell*, 3 A. R. 500; and *Jenking v. Jenking*, 11 A. R. 95 (1884), cited under s. 39, *infra*; *Wood v. Hurl*, 28 Gr. 146 (1881).

(d) *Murcar v. Bolton*, 5 O. R. 164 (1884).

of the Court wherein the proceedings are taken, or of a Judge thereof; provided that such sale be considered by the said Court or Judge more advantageous to the parties interested; but no proceedings shall be taken under this Act until one year next after the decease of the testator or party dying intestate, in whom the lands or estate in lands to be so partitioned or sold may be vested. R. S. O. 1877, c. 101, s. 8.

"Any party interested may file a petition":—Under section 5, *supra*, have already been enumerated some of the parties interested. It will be profitable to take up some of the classes of interested parties and see how far they are likely to succeed in a petition for partition.

*Dowresses*:—The rights of a dowress under this section were discussed in *Fram v. Fram (e)*: Boyd, C.—"The best answer to the application of the plaintiff is that what she seeks is a novelty. Both 'The Dower Act' and 'The Partition Act' have been in force since the earliest times, and their provisions must not be regarded as contradictory. Some expressions in 'The Partition Act' authorize the application of a dowress for partition, but I do not assent to the proposition that every dowress is to have partition. The dowress might formerly have proceeded by action at law or in Chancery to obtain her dower, and *Devereux v. Kearns* indicates that it is possible for her to proceed for partition also, but not in all cases, and in fact not in that case. Why should these men be brought in and compelled to suffer partition or sale, when dower can be assigned? If this absolute right of a dowress to partition existed we should have had widows coming in and asking for partition before now. In a case where the *terre tenant* is a single owner as here it would be perfectly absurd to have a partition or sale. In my opinion my brother Robertson might have vacated the order of the local Master without costs, but we cannot reverse his disposition of the costs; we can only say that this appeal shall be dismissed, without costs. The whole proceedings may be vacated if the plaintiff

(c) 12 P. R. 185 (1887).

(f) 11 P. R. 45  
following *Hobson v. Hobson*  
9 P. R. 455 (1883).

desires it, and she may be thus left to initiate fresh proceedings in any way she pleases."

Ferguson, J.—"I agree in the remarks which have been just made. I retain the opinion I expressed in *Devereux v. Kearns* as to the right of a dowress to apply for partition, but I did not decide, nor do I think, that she can do so in every case. I agree that the possibility of her taking these proceedings does not give her the absolute right. If a number of parties were interested and there had to be a partition, then the dowress might be the one to apply; but I don't think she should be allowed to avail herself of 'The Partition Act' for the mere purpose of urging before the Master that there should be a sale. There is power to say that she shall proceed under the 'Dower Act,' and this is a case in which the Court ought to say so."

In *Devereux v. Kearns* (*f*), Ferguson, J., says: "In the present case all parties interested, except the applicant, strenuously resist the partition asked for. What, as against the others, the applicant would be entitled to as a matter of partition would be in the setting apart of her dower. Such a partition would also be subject to whatever difficulty might arise by reason of the matter raised by Mr. Langton respecting the infant, being as to the others, excepting the applicant, entitled in severalty. The applicant who asks for partition already has the judgment of another Division of the Court for her dower out of these lands. This is all that in any view of the case she could obtain on this application, and this is, as her counsel says, what and all that she asks for, although she desires to force a sale of the whole lands upon the others, who do not want either a partition or a sale. . . . As the matter is, I cannot but think that this former suit pending for substantially the

(*f*) 11 P. R. 452 (1886), overruling *Rody v. Rody*, 1 C. L. T. 546 (1881), following *Hobson v. Sherwood*, 4 Beav. 184 (1841). See further, *Lalor v. Lalor*, 9 P. R. 455 (1883), also *s. 49, infra*.

same cause operates as a bar to the further maintenance of these proceedings." The application was refused with costs.

*Mortgagees of undivided interests*.—In *Laplane v. Seamen* (g), the appellant was first mortgagee of S.'s undivided sixth interest. "Laplane's bill prayed for payment of his mortgage debt, and in default for a partition or sale of the mortgaged premises. He had in fact no *locus standi* to file such a bill and that difficulty being noticed at the hearing, one of the tenants in common, Benjamin Sanderson Seamen, was added as a co-plaintiff, and a decree ordinarily made in suits for partition was made in this case, directing the inquiry whether a partition or sale would be most for the interest of the parties. . . . It would have been better if Laplane's bill had been dismissed. He was, I take it, allowed to remain a party to the suit in order to save the necessity of another suit by him to realize his mortgage debt, and in order to his being paid out of the proceeds of the contemplated sale. Taking that to be so, he was not the party to intervene actively in the proceedings in relation to partition or sale. Properly, his position was to leave the conduct of the sale to Benjamin S. Seamen, the tenant in common with the defendants, and to intervene only when there was money in court to be divided."

*Squatters on Crown Lands*.—"The deceased was simply allowed to live on the premises in question; he had no pre-emptive right, nor has the Crown recognized in any way his claim. If partition be granted here, any squatter's heirs may come to the court and ask for partition. There must be some estate or interest to warrant the interference of the court; and that not being shewn here, the bill must be dismissed with costs. The Crown can, without the assistance of this court, determine what is right to be done

(g) 8 A. R. 557 (1883).

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between, not only the Crown and the parties, but between the parties respectively" (h). A similar view was taken in the case of a deceased locatee of unpatented land (i).

*Tenants for life*:—"Gaskill v. Gaskill, 6 Sim. 643, determined that a tenant for life may have a partition; and where there is a right to a partition there may be a right to a sale, as the court shall determine" (j).

*Trustees for sale*:—"It is plain, I think, that the plaintiff, being a trustee for sale only, is not in a position to demand and have a partition" (k).

*Of partition in the nature of specific performance*:—"If an agreement for the division of lands would not be ordered to be specifically performed in favor of the plaintiff, he cannot get a partition on the lines of that agreement. "The plaintiff asks for a partition of the real estate, in accordance with the terms of an agreement mentioned in the bill. This is tantamount to asking a specific performance of the agreement. It is entirely plain that this cannot be granted" (k).

*May file a petition*:—"There are at least three possible modes of invoking the assistance of the High Court in matters of partition, which modes we may enumerate in the order of their introduction into this Province. I. By a suit commenced by filing a petition as under this Act: Introduced by 2 Wm. IV. c. 35, in 1832;

II. By a bill in Chancery, (now a writ of summons in the High Court); introduced by 13 & 14 V. c. 50, in 1850; and

III. By motion under Consolidated Rule 989: introduced by General Order 640, in 1879.

(h) Blake, V.C., in *Jenkins v. Martin*, 20 Gr. 613 (1873).

(i) Abell v. Weir, 24 Gr. 464 (1877).

(j) Lator v. Lator, 9 P. R. 455 (1883). See further, s. 49, *infra*.

(k) Keefe v. McKay, 29 Gr. 162 (1881).



I. *Petition*:—"The proceedings in the suit appear to have been commenced in the *usual way* by a petition for partition" (l). A petition, then, was the usual way of asking partition, before what is now Rule 989 came into common use. While proceedings by petition have some advantage (*e.g.*, in simplicity), yet, generally speaking, a petition is not a proper proceeding where there is a dispute as to the state of facts, and those facts present any complexity. It was customary, in fact, for the Court of Chancery, when the complexities of the case presented themselves, to refuse the petition and allow a bill to be filed. Thus in *Ex parte Storks* (m) Lord Eldon says: "There is, however, so much to be broken through upon points that have long been considered settled, that it is impossible to do this upon petition. I repeat the offer that has been frequently made from this place, that you may file a bill if you please: a course the more proper on account of a case now pending before the Master of the Rolls" (n).

It is true that under the present Act, sections 32 and 33 provide for the raising and trial of issues. That, however, has not changed the nature of the proceeding by petition, as we learn from *Bennetto v. Bennetto* (o), where Blake, V.C., says: "I do not think that this is a case for the operation of 'The Partition Act.' This Act is only intended to apply to simple cases where some common title in the petitioner and respondents is admitted, and the only question is the extent of the interests of the various parties. The object of an application for the allowance of the petition is to require the petitioner to shew that he was entitled to partition before the case is referred to the Master to ascertain the amount of his share. It is essential

(l) *Jenking v. Jenking*, 11 A. R. 93 (1884); the petition was filed in 1879.

(m) 3 Ves. & B. 105 (1814).

(n) Cf. *Pentland v. Quarrington*, 3 Myl. & C. 249 (1837).

(o) 6 P. R. 145 (1871).

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in proceeding under this Act that the petitioner should admit some title in the respondents. In cases like the present, where any title in the respondents is denied, the court must be applied to in the ordinary way by bill."

II. *Proceedings by bill*.—The powers conferred on the Court of Chancery in Upper Canada in 1850 would naturally be called into effect by the proceeding known as filing a bill; which was the ordinary way of getting that court into motion. In matters of partition, however, proceedings in Chancery could be begun either by petition or by bill. Thus C. S. U. C. c. 86, s. 38, speaking of equitable fees simple confers exclusive jurisdiction on the Court of Chancery, "upon *petition or bill* filed in that court" (p).

While there are not wanting instances of partition proceedings begun in Chancery by petition (q), still by far the greater number of partition suits contained in our Chancery reports appear to have been commenced by bill. The Court of Chancery, moreover, seems to have been of opinion that it contained within itself complete power to effect whatever "The Partition Act" could possibly do, in the way of partition, and consequently we find not a great many references to the Act in our reports of Chancery cases. At the same time, whenever the Court of Chancery did consider the Act, it endeavoured to harmonize the procedure under the Act with the court's own well tried methods. As expressed by Esten, V.C.:

"The court will use its own machinery for carrying the purposes of the Act into effect, so far as possible consistently with the express directions of the Act, of which the provisions are somewhat singular, and do not appear to have been necessary or to have effected any improvement in the practice, so far as courts of equity are concerned" (r).

(p) Cf. 32 V. c. 33, s. 38.

(q) e.g. *Re Foster*, 1 Chy. Ch. 104.

(r) *Re Foster*, 1 Chy. Ch. 104.

The result of this attempt to harmonize the procedures might sometimes result in the Master or person entrusted with the machinery of the court taking both procedures simultaneously (*s*).

Since "The Judicature Act," of course, the old method of proceeding by bill is superseded by the proceeding by writ of summons in the High Court. It is undoubtedly open to any one to begin partition proceedings by a writ of summons, although, as we shall see (*t*), he will not be allowed the extra costs incurred by that expensive method if proceedings for partition under rule 989 could have been taken.

It remains to consider what cases are suitable occasions for beginning the proceedings by writ of summons. It has been mentioned under the head of Petition that that form of procedure is not suited to cases of complexity, when the title is disputed; and it will be seen that the same is true of the procedure under rule 989. The question then arises how far the procedure by writ is suited to such cases. Daniell says (*u*): "The Court of Chancery generally refused to try a disputed legal title in a partition suit (*v*); but, at the desire of all parties, such court has decided a question of law in a partition suit (*w*). The High Court has power to try any legal claim properly brought before it, in any cause or matter (*x*); but this provision is modified by the rule that no cause of action shall, unless by leave of the court or judge be joined with an action for the recovery of land,

(*s*) See *Robson v. Robson*, 10 P. R. 324 (1884).

(*t*) See notes to s. 55, *infra*.

(*u*) Chy. P. 6th ed. (1884), 1336.

(*v*) Citing *Slade v. Barlow*, L. R. 7 Eq. 296 (1869); *Giffard v. Williams*, L. R. 5 Ch. 546 (1870); *Pryor v. Pryor*, W. N. (1872) 133; *Moore v. Kempston*, Ir. R. 4 Eq. 306; *Ward v. Ward*, 18 W. R. 87 (1870); *Bolton v. Bolton*, L. R. 7 Eq. 298 (1869).

(*w*) Citing *Burt v. Hellyar*, L. R. 14 Eq. 160 (1872); *Sanders v. Sanders*, 19 Ch. D. 373 (1881).

(*x*) See 36 & 37 V. c. 66 (Imp.), s. 24 (2); cf. R. S. O. 1887, c. 44, s. 52, (6) and (7).

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except claims in respect of mesne profits, or arrears of rent, and damages for breach of contract (*y*); under which rule it has been held that an action to establish title to land is an action for the recovery of land" (*z*). Such being the state of the law, the better plan in cases of disputed legal title would be to establish the title in an action brought for that purpose, and then to move for partition under C. R. 989.

There may, however, be cases in which a writ of summons may be the preferable method of commencing proceedings for partition. Thus a suit is frequently brought for administration and partition. Under ordinary circumstances the procedure would be by motion under the analogous rules 965 and 989. But circumstances may arise in which the motion for administration under rule 965 would not be available. In which case the action for administration would be commenced by writ of summons; and the writ would properly claim partition also.

III. *Motion under C. R. 989*:—We have the following rules which now regulate the practice on this matter, and which we may here discuss:

989. Any adult person entitled to a judgment or order for the partition of an estate may, on serving one or more of the persons entitled to a share of the estate of which partition is sought, with a 14 clear days' notice of motion, apply to the presiding Judge in Chambers, or to the Master in the county (other than the county of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; whereupon the Judge or Master may make such order for partition or sale, or such other order as may be proper; and the Master shall thereupon proceed in the least expensive and most expeditious manner, according to the practice now in force, for the partition or sale of the premises, the ascertainment of the rights of the various persons interested, the adding parties, the taxation and

Adult party may apply to Local Master for partition on motion.

Proceedings on judgment for partition.

(*y*) Cf. C. R. 341.

(*z*) Citing *Whitstone v. Dewis*, L. R. 1 Ch. D. 99 (1875); *Tawell v. Slate Co.*, L. R. 3 Ch. D. 629 (1876); *Gledhill v. Hunter*, L. R. 14 Ch. D. 492 (1880).

Infants interested must be represented by guardian *ad litem*.

Money not to be paid out without Judge's order.

When after judgment, lands discovered in another county.

Entry of orders. At conclusion of suit papers to be forwarded to Clerk of R. & W.

payment of costs and otherwise. Provided always that where an infant is interested in the estate, no order shall be made for partition or sale until such infant is represented by its guardian *ad litem*; and provided also that all moneys realized from the estate shall at once be paid into court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge in Chambers or the Court; and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper. Chy. O. 640.

990. When after an order has been made under the preceding Rule, lands are discovered in another county, an application may be made to a Judge of the High Court in Chambers for the partition or sale of such lands under the order formerly made, and where two or more orders have been made by Masters in different counties, an application may be made in Chambers for an order as to the conduct of the future proceedings. Chy. O. 641.

991. The Local Masters shall enter in books kept for that purpose, all judgments, or orders, made by them, in administration and partition matters and they shall on the conclusion of the proceedings, annex together all the papers filed with them in such proceedings, and transmit the same to the Clerk of Records and Writs, who shall duly enter the same. Chy. O. 650.

*Operation of C. R. 989:*—An explanation of the application of this rule is contained in *Macdonell v. McGillis* (a): "The plaintiff had served a notice for partition or sale under General Order 640 (b) returnable before the Master at Cornwall. Before the notice was returned it became apparent from the evidence filed in answer, that the defendants intended to dispute the plaintiff's right to the the partition and to any interest in the lands in question. The plaintiff now applied in Chambers, upon notice to all parties, for an order to vacate or stay all proceedings under the first notice, for his costs of the same, and for leave to file a bill for partition, alleging that he was unaware that defendants intended to dispute his title until the evidence in answer was put in.

(a) 8 P. R. 339 (1880).

(b) The present rule, 989.

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(c) 8 P. R. 5.

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"*Blain*, for the plaintiff. It has been understood that the General Order is intended to apply to simple cases only, as where the parties consent to the order, or where no doubt exists, and that where a contest such as is involved, where a question of title arises, as in this case, a bill must be filed. The case of *Heywood v. Sivewright*, 8 P. R. 79, would seem to support this view; and an analogy might be found in the old practice of requiring a bill instead of a Chambers application in adverse suits in all but simple cases.

"Blake, V.C., made the order asked, reserving costs of the proceedings before the Master, and of the application, until the hearing or other disposition of the suit."

In *Re McMillan (c)*, an application under G. O. 640 was made before the Master at Cornwall. The defendant, who occupied the property in question, claimed an absolute title by possession under the Statute of Limitations. The Master, notwithstanding, continued the inquiry and proceeded to take evidence. Spragge, C., directed the plaintiff to file a bill within two weeks, and the parties to go to a hearing at the then ensuing sittings at Cornwall, costs to be costs in the cause.

In *Young v. Wright (d)*, Blake, V.C., says:—"It appears on the affidavits that the defendant now sought to be restrained is not one of the joint owners, but a stranger in possession whose title to be in possession at all is denied. No relief can be got against him on motion without a bill filed. There must be some proceeding in the nature of an ejectment to oust him; and that relief cannot be granted on a summary application under Order 640 (e).

For proper method of joining infants as parties to proceedings under this Rule, see *Brown v. Brown (f)*.

(c) 8 P. R. 546 (1881).

(d) 8 P. R. 198 (1879).

(e) Cf. *Hopkins v. Hopkins*, 9 P. R. 71 (1881).

(f) 9 P. R. 245 (1882).

The words "*or such other order as may be proper*," confer on the Local Master ample jurisdiction to consolidate conflicting applications for partition; and he, and not a judge in Chambers, is the proper person to apply to for that purpose, where the notices of the motion for partition are returnable before him (g).

*Operation of C. R. 990:*—In *Clark v. Clark* (h) an order having been made under G. O. 640 (C. R. 989), a sale was moved for of lands in another county, although such lands were not discovered after the Master's order, but were known at the time of making the order. Spragge, C., held, that the case was within the scope and intention of Order 641 (*i.e.* the present rule), notwithstanding the use of the words: "When, after an order has been made, lands are discovered in another county."

This Rule, however, is not intended to make valid any order in which a local Master, by including lands in two counties, has exceeded his jurisdiction. Thus, in *Nicol v. Allenby* (i), Robertson, J., says: "Whatever jurisdiction the local Master has is conferred upon him by Order 640—reading which in connection with Order 641, it is clear that if the lands sought to be affected lie in more counties than one, the jurisdiction of the local Master does not attach. The Master in each county might have jurisdiction as to the lands in his county; but the object of the Order is to prevent more than one suit being brought, in respect to the same estate, and if by any chance more than one order is made, the several suits would be consolidated.

"I cannot bring my mind to the conclusion as contended for by Mr. Hoskin, that although the order under consideration in this case was void as to the lands in Oxford; it was good as to the lands in Waterloo.

(g) *Lambier v. Lambier*, 9 P. R. 422 (1883).

(h) 8 P. R. 156 (1879).

(i) 17 O. R. 275 (1889).

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(j) 7 P. R. 42

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(l) *Re Dennis*,  
27 Ch. D. 315 (1884)  
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6 O. S. 332 (1842)  
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"In and by the same order the Master has exceeded his jurisdiction, and he has continued that excess of jurisdiction to the sale of the lands: he has sold, not only the lands in Waterloo, but in Oxford. I am clearly of opinion, therefore, that, on principle and authority, as said by the late Chancellor in *Queen v. Smith* (j); the Master having no jurisdiction to make the order for partition, all proceedings under it are null and void."

*Under the directions of the Court, wherein the proceedings are taken, or of a Judge thereof:*—Among the matters which are excepted from the jurisdiction of the Master in Chambers are the following: "11. Proceedings as to Partition and sale of Real Estate, under the Revised Statutes, chapter 104" (k).

*Ouster of the jurisdiction to partition:*—The jurisdiction of the Court to make partition may be ousted by the unequivocal directions of a testator or the binding agreement of the parties interested. The following is an authority as to the directions of a testator: "The land in question is vested in the three sons as trustees on the express trust to sell, at the end of twenty years, from the testator's death, provided a majority of the heirs are in favour of a sale. This has been proved, that a sale is desired by a majority; and if so, the jurisdiction to partition is ousted. The persons selected by the testator to sell are proper persons to conduct that sale, and if wrong is being done they will be answerable, or they may be enjoined" (l).

*As to agreement of parties interested:*—"A suit for partition under the Partition Act would seem to be a very futile proceeding, when there has been a partition by agree-

(j) 7 P. R. 429 (1878).

(k) C. R. 30.

(l) *Re Dennis*, 14 O. R. 267 (1887); citing *In re Tweedie v. Miles*, L. R. 27 Ch. D. 315 (1884); *Patten v. Guardians of Edmonton*, 31 W. R. 785 (1883), and *Biggs v. Peacock*, L. R. 22 Ch. D. 284 (1882). Cf. *Cronk v. Cronk*, 6 O. S. 332 (1842); and *Hiscott v. Berringer*, 4 Gr. 296 (1854), case where trustees refused to act, and Court decreed partition.



ment, which the parties do not intend to abandon, since such a partition can neither be enforced nor set aside by means of such a suit (*m*). Still there is no reason why all parties interested should not, if they wish to give the form of law to their voluntary partition, join in such a suit and take partition under it" (*n*). The practice was not so liberal under 2 Will. IV. c. 35. The proceeding by writ of partition then in vogue, could not be had where all parties consented; which case was regulated by section 5 of that Act (*o*).

*But no proceedings, etc.*—R. S. O. 1877, c. 101, s. 8, following 32 V. c. 33, s. 6, had *six months* instead of *one year*, as in the present section. The principle of this provision is discussed in *Grant v. Grant* (*p*): Boyd, C.,—"An administration and partition, or sale, are sought by the administrator and some of the next of kin and heirs at law of an intestate. No special reason is given for applying within six months of the death. It is clearly too soon to apply for administration, under *Slater v. Slater*, 3 Chy. Chr. R. 1, and I think the analogy of the Partition Act (R. S. O. c. 101, s. 8), limiting six months from the death may very well apply to this case *see Bennett v. Bennett*, 8 Gr. 446. The policy of the statute should apply to all partition matters regarding the lands of a person deceased whether testate or intestate. I refuse the application with costs: (*see Rowsell v. Morris*, L. R. 17 Eq. 20)."

As the period in case of suits against an administrator is one year from the death of the intestate (*q*), it is probable that our Revisors of 1887 intended to complete

(*m*) Cf. *Morley v. Davison*, 20 Gr. 96 (1872),

(*n*) *Jenking v. Jenking*, 11 A. R. 96 (1884).

(*o*) *See Re Usher*, 1 U. C. R. 527 (1845); *Re Eastwood*, 1 U. C. R. 3 (1844); *ex p. Robinson*, Rob. & Jos., 2656; Cf. *Re Loney*, 10 U. C. R. 305 (1853).

(*p*) 9 P. R. 211 (1882).

(*q*) *Slater v. Slater*, 3 Chy. Chr. R. 1.

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the analogy above mentioned by fixing the same period in matters of partition.

*In whom the lands, etc. may be vested:—* A neat point arose in *Fram v. Fram* (r), where the interest of the petitioner was a right to dower: "It is objected at the bar that the application for partition is premature, inasmuch as six months had not elapsed since the death of the plaintiff's husband before she made application or took these proceedings. And the 8th section of the Partition Act (R. S. O. c. 101), is cited in support thereof. In my judgment that section does not apply, for the simple reason that 'the lands or estate in lands to be so partitioned' were not vested in the husband at the time of his death; it was not necessary, therefore, that six months should elapse before the application."

9. All proceedings under this Act shall be entitled in the Court in which the same are instituted, and shall be further described as follows:—

Entitling of proceedings.

"In the matter of partition between A. B. (naming the petitioner, or if more than one, naming all the petitioners in full), plaintiff (or plaintiffs), and C. D. (naming every then known party having any legal estate in the lands other than the petitioners) defendants." R. S. O. 1877, c. 101, s. 9.

Where the defendant is not misled by a notice of trial, any trifling irregularity therein, as, in this case, the omission of the words "In the matter of partition between" before the plaintiff's and defendant's names, in the style of cause, will not entitle defendant to set aside the verdict: and, irregularities of this kind should be objected to promptly, otherwise the Court will not interfere (s).

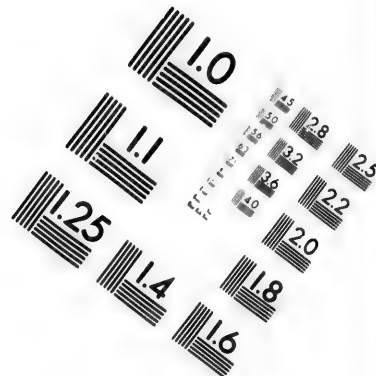
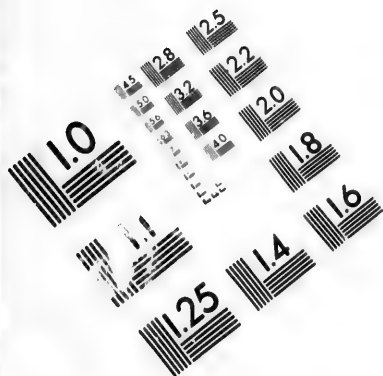
10. Every party having, at the time of filing the petition, any interest as aforesaid, shall be made a party to the partition proceedings; and the petition shall particularly describe the lands sought to be partitioned or sold, and shall also set forth the interest of the petitioner or petitioners therein, and his, or their respective place or places of residence and occupation, and the estate, rights and titles of all parties interested therein in

Every person having an interest shall be made party.

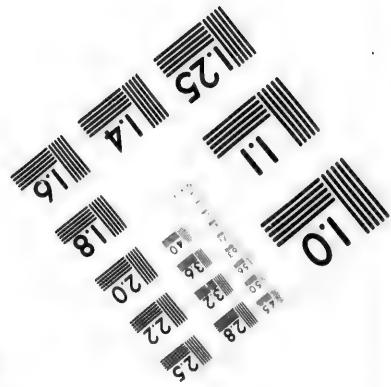
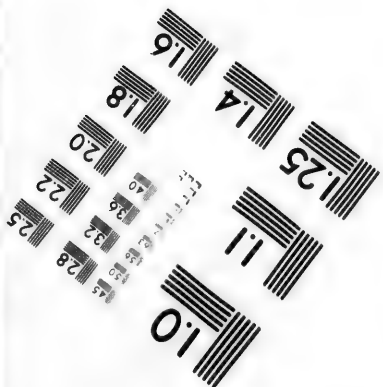
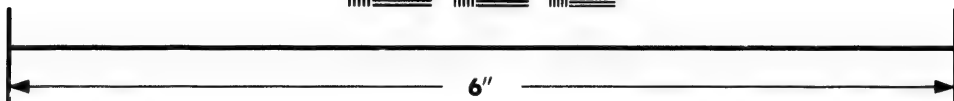
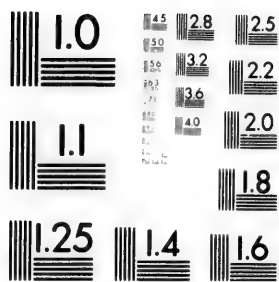
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(r) 12 P. R. at p. 189 (1887).

(s) *Symonds v. Symonds*, 20 U. C. C. P. 271 (1870).

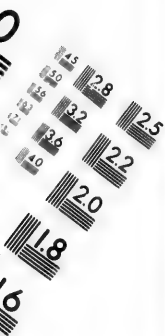


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anywise whatsoever, so far as the same are known to the party or parties petitioning as aforesaid; and in case one or more of such parties, or the share or extent of interest, or estate in the said lands of any party interested, is or are unknown to the petitioner or petitioners, he or they shall set forth the fact thereof in the petition. R. S. O. 1877, c. 101, s. 10.

*Every party having, etc.*:—For interested parties, see notes under sections 5 and 8 *supra*. A lessee may be a necessary party. Thus, in *Fitzpatrick v. Wilson* (t), Mowat, V.C., says: "The existence of the lease seems to be no defence to a bill for partition, though it may be material in forming a judgment as to whether the relief should be a partition or sale.

"The lease is not produced. If it does not affect the whole estate, regarding the infants share, it may be necessary to name the lessee a party in the Master's office" (u).

It was held (M. T. 2 V. 1), that there must be an *opposing* party, although the suit was an amicable one; and one of the parties consenting to the partition had to be dropped for that purpose (v).

Consolidated Rule 964 deals with petitions generally:

#### 1. PETITIONS.

Petition to be indorsed with notice of hearing.

964. There shall be indorsed on every petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own shewing as shall appear just. Chy. O. 265.

To be verified by oath.

11. (1) The truth of the petition, and matters contained therein, shall be verified by the oath or affirmation of at least one petitioner or his agent or guardian, as the case may be. The oath or affirmation may be taken before a Judge of any of

(t) 12 Gr. 440 (1866).

(u) Citing *Cornish v. Gest*, 2 Cox, 27, and other authorities.

(v) *Ex p. Robinson*, Rob. & Jos. 2656.

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the said Courts, a Commissioner for taking affidavits therein, or a Notary Public. R. S. O. 1877, c. 101, s. 11; 48 V. c. 16, s. 1.

(2) If in such case there is more than one infant defendant, for whom service is to be made on the official guardian, one copy only need be so served.

(3) From the time of such service the official guardian shall become and be the guardian *ad litem* of the infant unless and until the Court otherwise orders; and it shall be his duty forthwith to attend actively to the interests of the infant in the action, and for that purpose to communicate with all proper parties, including the father, or guardian (if any) of the infant, and also the person with whom or under whose care the infant resides, in case such person is not the infant's father or guardian; and the guardian is to make such other inquiries and to take such other proceedings as the interests of the infant may require. 44 V. c. 5, Rule 36, part.

*Verification* :—See *ex parte Robinson* (w) as to necessity for verification.

*Infants* :—It may prevent mistakes to remember that the provisions of "The Act respecting Infants," R. S. O. c. 137, s. 3 (x), have nothing to do with the subject of partition: "The twelfth Victoria was passed for a purpose totally different from the object the plaintiffs have in view in this suit, and cannot govern in deciding it" (y).

*Sub-sections (2) and (3)* :—These sub-sections also occur in our Consolidated Rules as sub-sections (a) and (b) to rule 258, which introduces them with the following: "Where the action is in respect of an estate in which an infant is interested, service on the official guardian shall be good service on the infant defendant." It certainly does not clarify the meaning of the present section, to have omitted this direction as to service on infants, and to have appended these provisions as sub-sections (2) and (3) to a section that has nothing to do with the matter with which they are dealing.

(w) Rob. & Jos. 2556.

(x) 12 V. c. 72.

(y) Esten, V.C., in *Bennett v. Bennett*, 8 Gr. 436, (1860), a partition suit.

In *Weatherhead v. Weatherhead* (z), which was a partition suit, an application was made for an order allowing substitutional service of the bill on the official guardian of an infant defendant, *the infant being resident without the jurisdiction of the court, and no provision being made for such a case under Rule 36, O. J. A. (i.e. the present section).* The order was made on the ground of saving expense, the share of the infant only amounting to \$40 (a).

In proceedings for partition, the infants should be joined as defendants not plaintiffs. Thus, in *Brown v. Brown* (b), a partition suit under G. O. 640 (now C. R. 989) the infants were joined as plaintiffs and the lands sold by auction. Proudfoot, J.—“held that the infants were improperly joined as plaintiffs: that they should have been defendants and represented by the official guardian; and directed a reference to the Master to fix the guardian’s commission as if he had been engaged in the suit from the beginning. On consent of the guardian, it was ordered that the proceedings taken for sale, if they proved to be regular, should stand; but this not to be a precedent.”

In case party interested be an infant.

12. In case any of the parties interested, other than a petitioner by guardian, is an infant, and the petition is not served on the official guardian under the preceding section, and in case it is proved to the satisfaction of a Court or a Judge that at least fourteen days’ notice has been served on the infant, if resident in the Province of Ontario, or otherwise served as herein-after provided, that proceedings will be taken under this Act for the partition or sale of the lands, and that the Court or Judge will be applied to, at the time and place specified in the notice, to appoint a guardian to represent the infant in the proceedings, the Court or Judge shall and may thereupon, whether the said infant resides within or without the Province, appoint a suitable and disinterested person to be a guardian for the infant for the special purpose of taking charge of the interests of the infant in the proceedings upon the petition. R. S. O. 1877, c. 101, s. 12.

(z) 9 P. R. 96 (1881).

(a) Cf. *Re Lane*, 9 P. R. 251 (1882), examination of infant defendants out of jurisdiction dispensed with.

(b) 9 P. R. 245 (1882).

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13. Every guardian appointed under the preceding section, unless he is the official guardian, shall, before entering upon his duties, execute to the real representative of the county wherein the estate, or any part thereof, is situate, by his own name of office as Surrogate Judge and real representative for the county, and his successors in office, and according to the term of the rule or order appointing the guardian, a bond in such penalty, and with such sureties as the Court in which such proceedings are to be taken, or a Judge thereof presiding in Chambers, directs, and to be allowed by an officer of the Court to be named in the order, upon proper proof of the sufficiency thereof, conditioned for the faithful discharge of the trust committed to the guardian, and to render a just and true account of his guardianship when required by the Court or a Judge thereof, and upon such further conditions as the Court or Judge may direct; and no proceedings shall be taken upon the petition until the bond has been filed in the office wherein the petition has been filed. R. S. O. 1877, c. 101, s. 13; 50 V. c. 8, Sched.

Guardians to enter into a bond with sureties.

14. After the execution and filing of the bond, the guardian shall represent the infant in the proceedings upon the petition; and his acts in relation thereto shall be binding on the infant, and shall be as valid as if done by the infant after having arrived at full age. R. S. O. 1877, c. 101, s. 14.

Guardians to represent infants.

An unequal partition obtained in a County Court against a minor and *feme covert* through the contrivance of the co-tenant, the gross laches of the guardian *ad litem*, and the misapprehension of the Referee (c) as to the extent of his duty and power, was held not binding. The minor, on coming of age, filed a bill for a new partition, and a decree was made accordingly (d).

15. It shall be necessary that everything be proved against the infant, and it shall not be competent for a guardian to give any consent on behalf of an infant, but the Court or Judge may, on behalf of an infant, where it is deemed advisable in the interest of the infant, consent to such proceeding. R. S. O. 1877, c. 101, s. 15.

Proof against and consent on behalf of infant.

*Consent by guardian*:—That which is enacted by the present section was not always the law as to the power of a guardian to give consent on behalf of an infant. Thus,

(c) Appointed under C. S. U. C. c. 86, s. 17, which section has been repealed.

(d) *Merritt v. Shaw*, 15 Gr. 321 (1868).



in *Re Usher* (e) Robinson, C.J., speaking of a partition suit where all parties gave consent, said: "The guardian of the infant child of one of the devisees is competent, I conceive, under the 9th clause (f) to concur in the consent, on the part of the infant."

The present section was enacted in 1873 by 36 V. c. 16, s. 6.

*Consent on behalf of adult*:—The general rule is that the client is bound, as between him and his opponent, by any act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious that act may be. But where in a partition suit a person not a solicitor (or clerk to a solicitor in the cause) but acting for the defendant gave a consent in good faith, but inconsiderately and without the knowledge of the defendant, it was held that such a consent might be relieved against, on an application being made in Chambers for that purpose (g).

Where the adult co-heirs agreed to a partition and agreed to execute quit-claims to carry it out as soon as the minors came of age and united therein, but the minors, on coming of age refused to adopt the agreement, the agreement was held not binding on any of the parties; and the Court decreed a partition (h).

Where, by the will of the testator, the whole estate (consisting largely of personalty) was to be divided among the children on the youngest attaining twenty-one, it was held that until the youngest attained twenty-one, the adult parties were not entitled to call for a partition or distribution of the property (i).

(e) 1 U. C. R. 527 (1845).

(f) 2 Will. IV. c. 35, s. 9, represented by present s. 14.

(g) *Rolfe v. Crote*, 1 Chy. Ch. 308 (1865).

(h) *Wood v. Wood*, 16 Gr. 471 (1869).

(i) *Murphy v. Mason*, 22 Gr. 405 (1875).

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16. If any party interested in the estate respecting which proceedings are, or are proposed to be, taken under this Act, has not been heard of for three years or upwards, and it is a matter of uncertainty whether such party is living or dead, it shall be competent for a Judge to appoint a suitable and disinterested person to be a guardian, for the special purpose of taking charge of the interest of the said party and of those who, in the event of his being dead, are entitled to his share or interest in the estate. R. S. O. 1877, c. 101, s. 16.

Appoint-  
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three years.

17. The application may be made by any one interested in the said estate, and the Judge making the appointment may give such directions as may be necessary for the execution of sufficient bond which shall be entered into by the guardian so appointed, with sureties in the manner provided by section 13 of this Act. R. S. O. 1877, c. 101, s. 17.

\* Application  
to appoint  
guardian.

18. After the execution and filing of the bond, the guardian shall, in the proceedings, represent the said party, and those who, should he be dead, are entitled to his share or interest in the estate, and whether they, or any of them, are infants or otherwise under disability; and his acts in relation to such share or interest shall be binding on such party, and all others claiming, or entitled to claim, under or through him, and shall be as valid as if done by him or them. R. S. O. 1877, c. 101, s. 18.

Powers of  
guardian.

19. It shall be competent for the Court in which the proceedings are taken, upon proof of such long continued absence of the said party as affords reasonable ground for believing him to be dead, upon the application of the guardian, or any one interested in the estate represented by the guardian, to deal with the estate or interest of such party, or the proceeds thereof, and order the payment of the proceeds, or the income or produce thereof, to the person who, in the event of the said party being regarded as dead, appears entitled to the same. R. S. O. 1877, c. 101, s. 19.

Power of  
the Court to  
deal with  
the estate.

The Judicature Act, R. S. O. 1887, c. 44, contains the following provision:

28. In any action or proceeding in the High Court for partition or sale of the estate of joint tenants, tenants in common or co-parceners, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction that, in proceedings under The Partition Act, it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such action or proceeding for the said purposes as might be taken upon a petition under the said Act; and every deed or

vesting order made in any such action or proceeding shall have the same effect as a deed or vesting order made in proceedings under the said Act. R. S. O. 1877, c. 40, s. 52; 44 V. c. 5, s. 9 (1).

Guardian may apply to the Court for guidance.

20. Any guardian appointed under this Act shall be at liberty to apply to the Court from time to time, for direction and guidance in the management of the estate, and for compensation for his services in connection therewith; and the Court, or Judge may make all such orders, and give such directions in reference thereto, as appear just. R. S. O. 1877, c. 101, s. 20.

*"And for compensation, etc.," see notes under section 55 infra.*

Incumbrancers may be made parties after proceedings commenced.

21. (1) It shall not be compulsory, in the first instance, to make any person having a lien, on the estate, or any part thereof, by decree, mortgage or otherwise, a party to the proceedings, but the petitioner may make such creditor a party, and, in such case, the petition shall set forth the nature of the lien or incumbrance; and if the lien or incumbrance is on the undivided interest or estate of any of the parties to the petition, it shall be a lien only on the share of such party; and such share or estate as the case may be, shall be first charged with its just proportion of the costs of the proceedings in partition in preference to any such lien.

Proviso.

(2) If the person having the lien is not made a party to the proceedings, his lien shall not be impaired or affected thereby. R. S. O. 1877, c. 101, s. 21.

In *Macdougall v. Macdougall (j)*, Vankoughnet, C., says: "If a mortgage be created by the owner of the entire estate, partition can be had subject to that mortgage; but, if the owner of an undivided interest mortgage his legal estate in it, his mortgage must, I think, be before the Court. He must join in the conveyance; any extra expense occasioned by this should be borne by the mortgagor (k). The mortgagor has chosen to put the legal estate out of him. Surely when he seeks partition he must bring that legal estate before the Court for the benefit and protection of his co-tenants whom he seeks to bind."

(j) 14 Gr. 267 (1868).

(k) Citing *Cornish v. Gest*, 2 Cox. 27.

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22. (1) In cases where all the parties interested or known to be interested in the estate respecting which the proceedings are taken under this Act, are residents, or happen, for the time being, to be in the Province, a copy of the petition, with notice that the same will be presented to the Court wherein the proceedings are taken, or a Judge thereof presiding in Chambers, on some day and hour, to be named therein, shall be personally served thirty clear days previous to the day of presenting the same as aforesaid, on all the parties, whether infants or not, resident or being as aforesaid in the Province, who are interested in the lands and estate in question, or on any duly authorized agent or attorney of any of the parties interested in the estate.

How petition served when all parties in Ontario.

(2) Every such notice shall be addressed to all the parties interested who are known, and generally to all others who are unknown, having or claiming any interest in the estate, or whom it may concern.

(3) It shall not be necessary to serve the petition or notice upon a guardian appointed as aforesaid, if the same has been previously served upon the infant for whom the guardian has been appointed. R. S. O. 1877, c. 101, s. 22.

23. (1) If any parties having such interest are unknown, or if known reside out of the Province, or cannot be found therein, and have no known attorney or agent residing therein, the petition and notice may be served upon them, or any of them, by publication of a notice which shall set forth the names of the plaintiffs and defendants, and shall be directed to the defendants and to all unknown persons having or claiming any interest in the land, and describing it as it is described in the petition, and stating the Court to which, and the time and place when and where, the petition will be presented, and calling upon all persons then and there to appear and state what claims, if any, they have to the land, and stating that in default of their so appearing the matter will be proceeded with in their absence.

How petition served when parties are unknown, or reside abroad, etc.

(2) The form of the notice shall be settled in each case by the Judge before publication thereof. R. S. O. 1877, c. 101, s. 23.

*Object of section 23:*—The present section 23 is from 32 V. c. 33, s. 14 (as amended by 36 V. c. 16, s. 1) and was introduced in 1869. It was perhaps intended to simplify the law as to service, as laid down in *Tryon v. Peer* (1), where Vankoughnet, V.C., said: "I think the other objection for want of parties must also prevail. It appears that there are certain infant children of a Mrs. Knapp deceased,

(1) 13 Gr. 316 (1876).

who are entitled as co-heirs in the same degree with the plaintiff, and they apparently are not made parties to the bill, although their father is, the plaintiff excusing himself from making them parties by a statement 'that they reside with or near their father in the State of Iowa, in the United States of America, which is the most precise information of their place of residence your complainant has been able to obtain, although he has used due diligence and made inquiry to ascertain the same.' It does not appear from this statement that there is any difficulty in serving these infants. Their father is made a party, and if he can be served they 'who reside with or near him,' can be served. It is a general rule that all parties interested in the subject matter of a suit should be brought before the court and the plaintiff here has not brought these infants within any of the exceptions to that rule, on which the court excuses the absence of parties."

Publication of notice in Gazette and newspapers.

24. The notice shall be published in the Ontario Gazette for four weeks before the presentation of the petition, and in a paper published in the county within which the lands lie, and if there is no such paper, then in a newspaper published in the city of Toronto once in each week for four weeks before the time when the petition is to be presented. R. S. O. 1877, c. 101, s. 24.

Notice to be posted on court house and school-house.

25. A copy of the notice shall be put up at or near the door of the court house of the county wherein the lands lie more than four weeks before such time, and shall at the same time be put up at the school-house of the section or school division within which the land is situate. R. S. O. 1877, c. 101, s. 25.

Publication of notice equivalent to personal service.

26. Such publication, upon proof thereof by affidavit, shall to all intents and purposes be equivalent to personal service upon all or any such unknown or absent parties. R. S. O. 1877, c. 101, s. 26.

Service may be made upon solicitor or agent in Ontario.

27. The petition and notice may be personally served, without such publication, on any known absent party or upon his solicitor or agent, if he has any, residing in Ontario, thirty clear days previous to the presentation thereof, and the reasonable costs of serving any absent party shall be taxable as costs of the proceedings. R. S. O. 1877, c. 101, s. 27.

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28. Upon the presentation of a petition, and upon such proof of service or publication thereof, with the notice as aforesaid, and of the facts justifying the mode of publication, as may be satisfactory, the Court or a Judge thereof presiding in Chambers shall and may by order allow the petition. R. S. O. 1877, c. 101, s. 28.

Allowance  
of petition.

"The object of an application for the allowance of the petition is to require the petitioner to shew that he was entitled to partition before the case is referred to the Master to ascertain the amount of his share" (*m*).

29. Immediately after the allowance of the petition, upon the application of the party prosecuting the same, the officer with whom the petition has been filed shall sign a certificate which shall set forth that the petition was allowed for partition of the lands and tenements, describing them, which certificate may be registered in the registry office of the registry division in which the lands lie. R. S. O. 1877, c. 101, s. 29.

Registration  
certificate of  
allowance.

30. Upon the petition being allowed, notice of the order of allowance, copies thereof, and all other orders, copies, notices or other paper writings in any proceeding, subsequent to the service of the petition, unless otherwise in this Act specially directed, may be served on the solicitor of any party defending, and in case there is no solicitor, by posting up the same in the office, in the county wherein the estate or any part thereof is situate, of the Registrar or Deputy Clerk of the Crown when the proceedings are in the Queen's Bench or Common Pleas Division, and in the office of the Clerk of Records and Writs, or Deputy Registrar when the proceedings are in the Chancery Division, and in the office of the Clerk of the County Court when the proceedings are in a County Court, which posting shall be equivalent to and as effectual as personal service on the party or parties to be affected thereby. R. S. O. 1877, c. 101, s. 30.

How notice  
of allow-  
ance, etc.,  
served.

31. Upon the allowance of the petition the parties interested in the estate shall and may appear in person or by solicitor, and by a concise statement of facts under oath, by way of defence, and further, according to the practice of the Court in which the petition has been filed, shew title as to the proportions which they or any of them claim of the premises set forth in the petition within fifteen days next after being served with a copy of the order, with a notice annexed thereto or endorsed thereon, requiring them to answer within the time above specified. R. S. O. 1877, c. 101, s. 31.

Parties in-  
terested  
may appear  
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(*m*) *Bennetto v. Bennetto*, 6 P. R. 145 (1874).

Parties may  
plead, etc.

32. A party appearing may answer under oath, either separately or jointly with one or more of his co-defendants, that the petitioners, or any of them, at the time of prosecuting the petition, were not entitled to or in possession of the premises or any part thereof; or that the defendants, or any of them, had no interest in the premises, or did not hold the same, together with the petitioners at the time of the commencement of the proceedings as alleged in the petition; or such other matter as such person shall desire to set up in answer according to the facts; and, at the expiration of the fifteen days allowed for answering, the petitioner or petitioners may, upon a verified copy of the petition and of all pleadings that may have been filed as aforesaid, and upon exhibiting *prima facie* proof of his or their title, and upon such statement or affidavit as may be necessary, apply to the Court or a Judge in Chambers to finally determine any issues or questions raised by any party or parties interested; or for an order directing the trial of any issues of fact that may have been raised by the pleadings; or that a special case may be stated for the opinion of the Court in which the petition has been filed; or both for the trial of an issue of fact or law; or for any other order that the Court or a Judge may think proper under the circumstances. R. S. O. 1877, c. 101, s. 32.

*Pleading*:—A respondent may demur (n).

Issues to be  
tried  
thereon.

33. All issues joined and ordered to be tried by the Court or a jury, shall be tried by the Court or jury, in the same manner as other issues are determined, on a record made up of the petition and of the defence pleaded thereto; and the like proceedings shall be had thereupon in every respect as to new trials or amendments, and any other particulars as in ordinary actions; and any special case so ordered as aforesaid may be made up and proceeded upon, inclusive of signing judgment thereon, in like manner as the law directs for the practice as to special cases. R. S. O. 1877, c. 101, s. 33.

Issues in partition suits under this and the preceding section were held to be within the scope of section 17, subsection 2 of "The Law Reform Act, 1868" (o), so that such issues in the County Court might formerly have been tried at any sittings of assize, or *nisi prius* for the county without an order permitting the same (p). But the law has been changed on this subject, so that now, the order of a

(n) Cronk v. Cronk, 1 U. C. R. 471 (1841).

(o) 32 V. c. 6, s. 17 (2).

(p) Symonds v. Symonds, 20 U. C. C. P. 271 (1870).

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High Court Judge is necessary before entering such issues for the sittings of the High Court at the county town (q).

34. If none of the parties answer within fifteen days next after the service as aforesaid of the order of allowance of the petition, the petitioner shall be at liberty to sign judgment of partition; and thereupon and upon giving and serving fifteen days' written notice thereof, in manner hereinbefore provided, and upon exhibiting the evidence, and proof in the next section of this Act mentioned, may apply to the Court or a Judge for the order mentioned in the next and following sections and proceed in the manner in the said sections provided. R. S. O. 1877, c. 101, s. 34.

Proceedings  
in default of  
answer, etc.

35. (1) The petitioners shall, whether or not the other parties who have been called upon to appear and answer have appeared and answered, exhibit *prima facie* proof of their title at the time of the application for the order for partition; or if an issue in fact has been ordered or a special case stated as aforesaid, then upon the final determination of the questions of law or fact, (if any), so ordered to be tried as aforesaid, or in any or either of the cases aforesaid, the Court or a Judge shall, by order, determine and declare the rights, title and interests of all the parties concerned, and thereby order the real representative to proceed as herein-after directed, according to such rights, but not so as to affect any parties whose rights have not been ascertained.

Petitioners  
to prove  
title, etc.

(2) The Court or Judge may, if it seems expedient to the said Court or Judge, in the first instance order a sale of the said lands without a reference to the real representative. R. S. O. 1877, c. 101, s. 35.

Judge may  
order a sale  
without a  
reference.

*Title*.—"The court, before granting him partition, must be satisfied of his title; and this they could not be without first seeing that the land came to the intestate in such a way as to entitle the relatives of the half blood to it. The plaintiff, perhaps, need not have set out his title in particular; but when he does so he must shew a perfect one as, under a general allegation of title, he must prove one" (r).

*References*.—This section affords another instance of the court employing its own machinery to effect the purposes of the Act (s). References in partition are not

(q) R. S. O. 1887, c. 44, s. 97.

(r) Vankoughnet, C., in *Tryon v. Peer*, 13 Gr. 315 (1867).

(s) See in *Re Foster*, cited under section 8, *supra*.



now made to the "real representative" (Surrogate Judge) as such, but to the Master (who may or may not be the Surrogate Judge) (*t*). This was both the practice in the Court of Chancery in partition matters, and is expressly provided in C. R. 989 (*u*).

*References, to whom and how conducted* :—Ordinarily, the reference may be made to the Local Master of the county in which the lands are situate. But in *Re Arnott-Chatterton v. Chatterton* (*v*), where the lands were in Northumberland, but lay nearer to Whitby (county town of Ontario) than to Cobourg (county town of Northumberland), and the reference could be held with more convenience and less expense to all parties at Whitby, an application was granted for an order referring to the Master at Whitby, and it was held that such application was properly made to a Judge in Chambers and not to the Referee, under general order 640 (now C. R. 989).

In *Re Rogers* (*w*), where there was a reference under G. O. 640, and a question arose as to the validity of a lease and also as to its fraudulent alteration it was held that the tribunal known as the "Master's Office" had no jurisdiction to try these questions, and the reference was adjourned until the questions should be determined.

C. R. 73 gives the Master considerable latitude as to the way in which he shall conduct a reference. Thus in *McKay v. Keefer* (*x*), "the Master appointed two indifferent persons, being, as it is said, and not denied, skilled or possessing special knowledge on such subjects, who examined the property and proposed a plan of partition. He then caused one of these, and I do not know but the

(*t*) See R. S. O. 1877, c. 44, s. 125.

(*u*) See notes to section 8, *supra*.

(*v*) 8 P. R. 39 (1879).

(*w*) 11 P. R. 90 (1885).

(*x*) 12 P. R. 256 (1887), Ferguson, J.

(*y*) Now  
(*z*) Wood  
notes to section  
(*a*) See Ph  
(*b*) 15 Gr.  
(*c*) 8 Gr. 4  
H.R.P.

other as well, to be examined before him as a witness, and on the evidence he adopted or concluded a plan, scheme, or mode of partition, and, as I understand, is now prepared to say that there can be a partition, and to shew the character of such partition. He did not refer the matter to those persons and take the scheme devised by them, but adopted this mode of obtaining, under the peculiar circumstances, further evidence and more information, the better to enable him to exercise his own judgment in respect to the matter referred to him. . . . General Order 240 (y) does authorize the Master, in some cases, at all events, to substitute a different course of proceedings from that ordinarily taken, and I am not prepared to say that what the Master did in this instance is not within the meaning of this provision in the order."

*Reference of question of title:*—In a partition suit, a question of title, raised between co-defendants, was decided at the hearing and without being referred to the Master (z).

*Appeal from Master's report:*—There may be an appeal from the report of the Master finding the proportion in which each party is interested (a).

As to calculation of shares where one child has been advanced, see *Filman v. Filman* (b).

*Sale without reference to the real representative:*—In *Bennett v. Bennett* (c), Esten, V.C., ordered a sale without a reference to or return of the real representative, saying: "I think in a case like this, where the desire of all parties must be to save expense as much as possible, and when the

(y) Now C. R. 73.

(z) *Wood v. Wood*, 16 Gr. 471 (1869). As to disputed title in plaintiff, see notes to section 8, *supra*.

(a) See *Pherrill v. Pherrill*, 10 Gr. 580 (1864).

(b) 15 Gr. 643 (1869).

(c) 8 Gr. 446 (1860).

H.B.P.S.—13

facts are so distinctly shewn upon the evidence, there is not any necessity for any other proceeding than the usual reference to the Master."

Order on  
real repre-  
sentative to  
make parti-  
tion.

36. The Court or Judge shall, by the order of partition in the last section mentioned, direct the real representative to make the partition so adjudged according to the respective rights and interests of the parties, as the same may have been ascertained and determined as aforesaid; and in the order the Court or the Judge shall designate the parts or shares which remain undivided for the owners whose interests are unknown and not ascertained; and the real representative shall forthwith proceed to make such partition, according to the judgment of the Court or Judge, unless it appears to him that the partition cannot be made without prejudice to the owners of the estate, in which case he shall make a return of such fact to the Court in writing under his hand. R. S. O. 1877, c. 101, s. 36.

Formerly there was a provision (C. S. U. C. c. 86, s. 17) that parties consenting to a partition might appoint arbitrators to make the partition. This provision is no longer extant; probably because it was held in a certain case (*d*) where one of the arbitrators refused to act, that the court could not interfere, not having any original or common law jurisdiction, and the case which had arisen not being provided for in the Act.

How parti-  
tion shall be  
made.

37. In making the partition the real representative shall divide the real estate and allot the several portions and shares thereof to the respective parties so adjudged as aforesaid, designating the several shares by posts, stones, or other permanent monuments; and he may employ a surveyor to assist him therein; and he shall make or cause to be made a true and accurate plan or map and field book of the land, and shall describe particularly the metes and bounds of the same; and he shall return to the Court or Judge having cognizance of the proceedings, the plan or map, field book and description, and shall report to the Court or Judge in writing the manner in which he has divided the estate, and the share allotted to each party, with the quantity, courses and distances of the boundaries of each share, and a description of the posts, stones or other monuments, together with an account of his fees, which fees together with any charges for surveys, shall be ascertained and allowed by the Court or Judge; and the amount shall be paid by the petitioners, and shall be allowed to them as part of the costs to be taxed against the estate. R. S. O. 1877, c. 101, s. 37.

Report and  
return  
thereon.

(*d*) *Re Knowles*, 24 U. C. R. 311 (1865).

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38. The report shall be proved by affidavit before a notary public or a commissioner for taking affidavits, and shall be filed in the Court; and a copy thereof, after the report is confirmed by the Court, and certified under the hand of the registrar or clerk of the Court, and under the seal of the Court, shall be registered in the registry office of the registry division in which the estate is situate, on the production of the copy to the registrar. R. S. O. 1877, c. 101, s. 38; 48 V. c. 13, s. 1.

Report to be proved, etc.

39. Upon the return of the report, the Court or a Judge in Chambers may confirm the same, or remit the same back to the real representative for amendment in any particular or particulars in which there is manifest error; and upon a final confirmation a Judge's order may be granted and obtained, confirming in due form the said report; and the order shall be binding and conclusive on all known parties named in the petition, and where publication has been made as aforesaid, then also upon all unknown and absent parties, and all persons claiming from or through them; but the judgment shall not affect any person or persons having claims as tenants, tenants in dower, or by the curtesy, or for life, to the premises which form the subject of the partition, nor any person not named in the petition, either originally or by amendment, nor any unknown person, where there has not been publication as aforesaid. R. S. O. 1877, c. 101, s. 39.

Report to be confirmed or remitted for amendment.

Effect of confirmation.

*Effect of final judgment:—Jenking v. Jenking (e) was* an appeal by the defendant Joseph Alexander Jenking from the order of the Judge of the County Court of the County of Essex dismissing the appellants' petition to vacate and set aside a certain partition of the lands and premises in question, made by the late Judge of the County Court of the County of Essex. Osler, J.A., after discussing certain cases cited for the appellant, says: "These cases, however, do not assist the appellant for two reasons: (1) because the proceedings for partition in the County Court are terminated by the order confirming the partition, and nothing remains to be done or could be done by way of enforcing the judgment, and (2) even if a court of common law could as Brett, L.J., suggests, have set aside a judgment obtained under similar circumstances, the County Court has no original or common law jurisdiction. It has no

(e) 11 A. R. 92 (1884).

authority but that which is set forth in the Rev. Stat. c. 101 (f), and the case which has arisen has not been provided for: *In re Knowles v. Post*, 24 U. C. R. 311, 313. So far as the County Court is concerned there is a final judgment of partition, which, if obtained by means of fraud or deception practised in the court, can only be impeached in resisting an action in which it is relied on: *Earl of Bandon v. Becher*, 3 C. & F. 479; or by bringing an action for the express purpose of setting it aside" (g).

*Delay in confirmation*:—*Re Park* (h) is a case illustrating the difficulties that are apt to arise where there is delay in getting the partition confirmed. The parties had acquiesced in the petition supposing it to be confirmed; but there was no record of any order confirming it. In the meantime the sole respondent to the proceedings died. The court refused to confirm, as such a proceeding would be void, being equivalent to giving judgment against a person several years dead. By our Consolidated Rule 620, an action does not abate on the death of a party, and judgment might be entered notwithstanding such death.

*Conveyance after confirmation*:—There is no special mention of conveyances in this section, such as in section 51, *infra*. In *O'Lone v. O'Lone* (i), a decree directed that a sale or partition of the property should take place as the Master might consider either course more for the interest of the parties, but contained no directions as to the conveyances or possession, or as to the execution of the deeds. The Master having reported in favor of a partition, the court, on motion, ordered the execution of conveyances and the delivery of the possession of the property agreeably to the finding of the Master.

(f) The present chapter 104.

(g) See further section 7, *supra*, and the notes thereunder. For effect of judgment in partition proceedings as evidence of title, see *Van Velsor v. Hughson*, 9 A. R. 390 (1883).

(h) 24 U. C. R. 459 (1865).

(i) 2 Gr. 642.

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*Dunn v. Dowling* (j) was a partition suit by bill under C. S. U. C. c. 86, and an application was made by the plaintiff for a vesting order of the portion of the estate allotted to him by the report; the report had been filed, and more than fourteen days had since elapsed. Spragge, V.C., at first doubted whether the report in such case did not require a special order of the Court to confirm it, but upon looking into the Act, held that such order was unnecessary, but that the Court must examine the report to see whether there is in it the manifest error referred to in section 24 (k) of the Act.

40. Upon the report of the real representative that it appears to him that partition cannot be made without prejudice to the owners of, or parties interested in the estate, the Court or a Judge in Chambers may order a sale of the estate, if deemed prudent to do so; and, by an order to be made on filing the report, may direct and order the real representative to cause the estate, or any part thereof, to be sold by a fit and proper duly licensed auctioneer (to be approved of by the real representative) at public auction to the highest bidder, reserving to the real representative power, from time to time, to adjourn the sale, if in his judgment an adequate price is not bid for the estate, or any part thereof, and in the order the Court or Judge shall direct the terms of payment of the purchase money, and the credit which may be allowed for any portions thereof, of which the Court or Judge may think proper to direct the investment, and which are required by the provisions hereinafter contained, to be invested for the benefit of any unknown owners, infants, parties out of the Province, or any tenants for life, in dower, or by curtesy or otherwise; and the portions of the purchase money for which credit is allowed shall be secured at interest by a mortgage of the premises sold, by a covenant or bond of the purchaser, and by such other security as the Court or Judge aforesaid may prescribe in the order or direct. R. S. O. 1877, c. 101, s. 40.

Sale if partition prejudicial.

[See Cap. 108, ss. 54-58, as to preference of purchase given to the person who would have been heir-at-law prior to 1st Jan., 1852.]

*Reference may be to real representative* (l):—"It would seem to be proper, if desirable, to refer the question of

(j) 1 Chy. Ch. 365 (1851).

(k) i.e. the present section 39.

(l) See notes to section 35, *supra*.



partition or sale to the real representative. The real representative is to make the sale if it be ordered. No power of sale is expressly given except upon the report of the real representative (*m*); but it would appear that the Court can order a sale in the first instance or upon the report of the real representative, if, on an order for partition, he should think a partition inadvisable, and should so report to the Court. I am not at present satisfied that a sale is necessary; and I think some evidence should be adduced on that head. Suppose a sale to be ordered, the next step is to make incumbrancers parties" (*n*).

*Sale in portions*:—In a suit for partition where infants were interested, affidavits were produced showing that a sale rather than a partition would be more for the benefit of the infants, and that the property from its nature and situation was not susceptible of equal partition. The decision of Spragge, V.C., was: "The fact of all the adult parties desiring a sale, and the saleable value of the property compared with its annual value, and the charges upon it, sufficiently prove, I think, that a sale would be for the interest of the infants, that is such a mode of sale as is proposed, namely sales of the various portions, as opportunities may present themselves from time to time; provisional contracts to be entered into and presented to a Judge from time to time, with evidence upon affidavit, shewing that the proposed sale would be advantageous to the infants; the sale to go into effect upon being marked as approved by the Judge" (*o*).

*Where infants pray an inquiry*:—In *Nash v. McKay* (*p*), where the bill was for partition, the Court

(*m*) Under 2 Wm. IV. c. 35, it was the freeholders who reported; cf. *Re Dennie*, 10 U. C. R. 104 (1852), now it would be the Master.

(*n*) *In re Foster*, 1 Chy. Ch. 103 (Ester, V.C.).

(*o*) *Steven v. Hunter*, 14 Gr. 541 (1868).

(*p*) 15 Gr. 251 (1868).

41. (1) The or other security purchase money said, in his representative

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said, "The infants pray an inquiry whether a partition or sale will be most for their benefit. The adult defendants pray a sale. There will be an inquiry as prayed by the infants."

*Partition or sale of water privilege*:—Where the bill was for partition of 200 acres of land on the River Ottawa and a water mill privilege appurtenant thereto, it appearing that to divide the water privilege would be very difficult and expensive, it was held to be the duty of the Court to consider the interests of all the defendants, and a sale of the water privilege, with sufficient land for the purpose, was ordered (q).

Cf. notes under section 19.

*The Judicature Act*, R. S. O. 1887, c. 44, has the following sections:—

31. In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order shall have the same effect as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a chose in action, as if such chose in action had been actually assigned to such last-mentioned person. R. S. O. 1877, c. 40, s. 101; 44 V. c. 5, s. 9 (1).

Vesting order, effect of.

53 (10) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service. 49 V. c. 20, s. 20.

Purchaser not affected by irregularities in orders of Court.

41. (1) The real representative may take separate mortgages or other securities for such convenient shares or portions of the purchase money as have been directed to be invested as aforesaid, in his name of office as Surrogate Judge and real representative for the county, and his successors in office, and

Mortgages taken on sale.

(q) *Blasdel v. Baldwin*, 3 A. R. 6 (1878).



for such shares as have been directed to be invested in the name of any known owner or party interested of full age, in the name of such person.

(2) Upon the sale being confirmed, the real representative shall deliver the mortgage to the clerk or registrar of the Court as the case may be, or deliver or assign the same to the known owner of the full age of twenty-one years, whose share has been ascertained and so invested. R. S. O. 1877, c. 101, s. 41.

Order for sale.

42. Where the notice of the petition has been published as required by this Act, the order for sale shall state that the notice has been so published, and that the sale will bind absent persons, whether known or unknown. R. S. O. 1877, c. 101, s. 42.

Orders binding absent or unknown persons.

43. Before making an order for sale, where the plaintiff desires to bind absent or unknown persons, the Court or Judge shall be satisfied that all persons who are known have been served with notice of the proceedings, and that the proper publication has taken place as directed by this Act; and the party prosecuting the proceedings shall produce to the Court or Judge, in addition to all title deeds, an abstract of the title of the lot, certified by the registrar of the registry division in which the lands lie. R. S. O. 1877, c. 101, s. 43.

Reference as to liens, charges, etc.

44. Before making an order for sale, where any creditors have specific liens on the whole estate, or any undivided interest or estate therein of any of the parties, by means of any mortgage or other lien or security sufficient to bind lands according to the law of this Province, the Court or Judge in Chambers shall direct a reference to an officer of the Court, to be named in the order, to ascertain and report whether the shares or interests in the premises of the parties in the proceeding, or any of them, are subject to any and what general lien or incumbrance as aforesaid. R. S. O. 1877, c. 101, s. 44.

Reference may be embodied in order for sale.

45. The reference may be embodied in the order directing a sale, and the order may direct payment out of the proceeds of the sale of the lands of such liens or charges. R. S. O. 1877, c. 101, s. 45.

Proceedings on reference.

46. The officer to whom the reference is directed shall forthwith cause a notice to be published once in each week for three weeks, in some paper, if there is one, published in the county or counties where the lands are situate, or if there is none published therein, then in a paper published in the nearest county thereto, requiring all parties having any lien or incumbrance, as aforesaid, on the whole or any part of the estate, to produce to the said officer on or before a certain day to be named in the notice, full particulars of all such liens and incumbrances together with

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satisfactory evidence of the amount due thereon; and the said officer shall immediately thereafter report to the Court or Judge the names of the creditors, the nature and extent of the incumbrance, the date thereof, and the several amounts appearing to be due thereon; and thereupon the Court or Judge, in the order directing the real representative to partition or sell the lands, shall also make reference to such liens and incumbrances, and define the same; and the real representative shall, in making the partition, be governed accordingly; and in any order directing the sale of the lands, or any part thereof, the Court or Judge shall and may authorize and direct the real representative to pay, satisfy and discharge the amounts of the liens or incumbrances so ascertained, with any accrued interest thereon, up to the time of payment thereof, after deducting therefrom the portion of costs, charges and expenses to which the same may be liable. R. S. O. 1877, c. 101, s. 46.

*Advertisement for creditors:—In Biggar v. Biggar (r)* a motion was made for an order for distribution under the report in a partition suit. The Master had dispensed with the usual advertisement for creditors, and certified that he had done so because the intestate had been dead for forty-five years. Blake, V.C.—“Creditors must be advertised for. The order for distribution may go, if no creditors appear in answer to an advertisement.”

In *Robson v. Robson (s)*, Boyd, C., says:—“In cases of sale of real estate held in co-tenancy, the Court should have regard to the provisions of *The Partition Act*, R. S. O. c. 101, and not without some very special and sufficient reason should the Masters under the compendious reference to them dispense with inquiries and advertisements for creditors holding specific or general liens upon the whole estate or any undivided share thereof, as directed by sections 43, 44 and 46 of that statute. This advertisement may be combined with the advertisement for creditors of the testate or intestate, where the proceedings are in the nature of an administration. These inquiries may go on contemporaneously with the proceedings to sell, and their object is

(r) 8 P. R. 488 (1881).

(s) 19 P. R. 324 (1884).

not only to clear the title, but inform the Court as to the proper recipients of the proceeds of the property sold."

Creditors,  
etc., may  
apply for  
payment out  
of purchase  
money.

47. Any party entitled as creditor as aforesaid or otherwise to a share of the estate, may apply to the Court or a Judge to order the part of the purchase money which he claims to be paid to him, on affidavit shewing the amount truly due on each incumbrance (if any), the owner of the said incumbrance and his residence, so far as known to such party, and also on proof of the due service of a notice on the petitioners and parties to the proceedings, and on every other incumbrancer, or on their solicitors or agents, of the intention to make the application at least fifteen days previous thereto, such service in any case where not made on the solicitor or agent to be personal, or on a grown-up person at the usual or last known place of abode of the person to be served, if residing in this Province, and if residing out of this Province, sixty days previous thereto, or by previously publishing the notice once a week for two calendar months in a weekly paper published in the county or counties where the estate is situate. R. S. O. 1877, c. 101, s. 47.

Real repre-  
sentative  
may pay  
creditors on  
order of  
Court.

48. The real representative shall and may, upon due proofs of identity, and upon the amounts thereof being ascertained and proved as aforesaid, upon the order of the Court or Judge in that behalf granted, pay each creditor as aforesaid from and out of the purchase money, the amount of his claim according to the priority thereof respectively, and shall cause the same to be duly discharged of record, first defraying and deducting the expenses and costs out of the moneys payable on the share or shares which were so incumbered; but the proceedings to ascertain the amount of the incumbrances shall not affect or delay the paying over or investing of money to or for any party upon whose estate in the premises there does not appear to be any existing incumbrance. R. S. O. 1877, c. 101, s. 48.

Sale of  
estate of  
tenant in  
dower, by  
the curtesy  
or for life.

49. (1) In case of an action or proceeding for partition or administration in which a partition or sale of land is ordered, and in which the estate of any tenant in dower or tenant by the curtesy or for life is established, if the person entitled to the estate is a party the Court or Judge shall determine whether the estate ought to be exempted from the sale or whether the same should be sold; and in making such determination regard shall be had to the interests of all the parties.

(2) If a sale is ordered including such estate, all the estate and interest of every such tenant shall pass thereby; and no conveyance or release to the purchaser shall be required from such tenant; and the purchaser, his heirs and assigns, shall hold the premises freed and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be

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to any undivided share, or to the whole or any part of the premises sold.

(3) In such cases the Court or Judge may direct the payment of such sum in gross out of the purchase money to the person entitled to dower or estate by the curtesy or for life, as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate; or may direct the payment to the person entitled to dower or estate by the curtesy or for life, of an annual sum, or of the income or interest to be derived from the purchase money or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as may be necessary. R. S. O. 1877, c. 101, s. 49(1); 42 V. c. 22, s. 5.

*Tenants for life and remaindermen:*—In *Murcar v. Bolton* (t), the Crown had, by letters patent, granted land to F. B. for life, with remainder to her children as tenants in common in fee simple. The remaindermen petitioned and the question was whether the Act gave power to the Judge of the County Court to direct the sale of F. B.'s life estate against her will. Held, that the case did not come within the Partition Acts.

50. Where a married woman is a party to such action or proceedings in respect to an inchoate right of dower, then in case of sale, the Court shall determine the value of such right according to the principles applicable to deferred annuities and survivorships, and shall order the amount of such value to be paid; or shall order the payment to such married woman of an annual sum, or of such income or interest as is provided in the preceding section, and such payment shall be a bar to any right or claim of dower. R. S. O. 1877, c. 101, s. 49(2); 42 V. c. 22, s. 6.

Determining value of claim to inchoate right of dower.

*Inchoate right of dower:*—In *Re Hewish* (u), four married men had been made parties to a partition, but their wives had not been made parties, either originally or in the Master's office. Two of them had, however, previously barred their dower in mortgages of the lands in question. It was contended that though the wives had not been

(t) 5 O. R. 164 (1884). This case is very interesting as giving the history of legislation upon the subject; but is somewhat unsatisfactory on account of the diversity of opinion among the Judges.

(u) 17 O. R. 454 (1889).

before the Court yet a purchaser was not affected by this, but was protected by R. S. O. 1887, c. 44, s. 53, s-s. 10. Boyd, C.—“I do not think *The Conveyancing Act*, R. S. O. 1887, c. 44, s. 53, s-s. 10, can be held to cut out the interest of the two whose shares have not been mortgaged. . . . I do not think I need apply *Re Hall-Dare's case* (v) by analogy in such a way as to produce what appears to be an injustice. . . . Having regard to the date of the mortgages, I think dower does not exist as to the two whose estates were mortgaged.”

Notices of sale.

Confirmation of sale.

Conveyances.

51. The real representative shall give notice of any sale to be made by him for such time and in such manner as he may see fit; and the terms of such sale shall be set out in the notice and made known at the time of sale; and after the completion thereof he shall report the same in writing to the Court, with a description of the different parcels of land sold to each purchaser and the prices at which the same have been sold; and, at the expiration of fifteen days next after the said sale and the due filing of the report, the sales may be approved and confirmed by the Court or a Judge thereof; and an order shall be made directing the real representative to execute deeds pursuant to such sales; and the deeds so executed shall be recorded in the registry office of the registry division in which the lands lie in the same manner as other deeds, and shall be a bar against all known parties interested in the premises, and against all unknown parties where notice was published as aforesaid, and against all persons claiming under or through them, and also against all incumbrancers where the notice hereinbefore mentioned has been given to them, in manner and form aforesaid. R. S. O. 1877, c. 101, s. 50.

*Confirmation* :—In a proceeding for partition a sale had been ordered by the court under which the real representative sold four of the five lots into which the property had been divided by the real representative, but there being no bidders for the remaining one at what he considered a reasonable price he withdrew it. The court suggested that it might be better to wait till the rest of the property was sold; but after consideration confirmed the sale and ordered deeds to be executed (w).

(v) L. R. 21 Ch. D. 41 (1882).

(w) *In re Westervelt*, 10 L. J. 15.

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52. Any partition or sale made by the High Court shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself. R. S. O. 1877, c. 40, s. 55.

Estates of married women, etc., to be bound.

Cf. notes to sections 19 and 43.

53. An office copy of the judgment, order or report declaring or effecting a partition or sale by the High Court shall be sufficient evidence in all Courts of the partition declared thereby, and of the several holdings by the parties of the shares thereby allotted to them. R. S. O. 1877, c. 40, s. 56.

Office copy of judgment, etc., to be evidence.

By C. R. 744, orders in matters of partition are to be entered in full.

54. Where the notice of the petition has been published as required by this Act, the deed to be executed by the real representative shall set forth the order for sale; and the said deed shall vest in the purchaser an absolute and indefeasible title to the estates and interests in the lands partitioned, to which all or any of the parties interested therein as co-tenants with the petitioner, or any one claiming under them, or any or either of them, or under the petitioner are entitled, and shall be conclusive evidence that every application, notice, publication, proceeding and act whatsoever which ought to have been given and done previously to the execution of the same, has been given and done by the proper parties. R. S. O. 1877, c. 101, s. 51.

Deed.

Effect of deed.

Cf. notes to sections 39 and 43.

55. The Court or a Judge in Chambers shall apportion the costs of the proceedings on the petition, according to the respective shares and interests of the parties, known or unknown, and shall direct the same to be paid to the petitioners, and such order shall operate as a judgment for such costs, and on a copy thereof being filed in the registry office of the registry division in which the lands lie, shall be a charge for such proportion against the shares representing such proportion; and execution may issue therefor; and such share or interest may be sold thereon, and a valid title on the sale be given to the purchaser thereof, as in the case of sales by sheriffs on execution; and, if judgment is rendered against the petitioners for any cause, the Court or Judge aforesaid shall adjudge costs against them, to be recovered as in ordinary actions. R. S. O. 1877, c. 101, s. 52.

Apportionment of the costs.

*Costs, party and party* :—"On looking into the English cases and precedents, I do not find that any other than party



and party costs are given by the decree in a partition suit, any more than in other suits. If in any instance costs between solicitor and client have been allowed here, it has no doubt been through oversight. . . . There being infants concerned in the present case, the consent of counsel does not affect the question" (x).

*Costs before and after the hearing*:—"In England, the general rule in suits for partition, is to give no costs to any party up to the hearing, and to direct the subsequent costs to be borne by the parties in proportion to the value of their interests.

"Our statute respecting the partition and sale of real estate directs that 'the court shall apportion the costs of the proceedings on the petition according to the respective shares and interests of the parties, known or unknown.' This enactment has always been construed, I believe, as including the costs of the petition itself.

"The result is that in unopposed cases parties must clearly bear the costs subsequent to the hearing in proportion to their respective interests, or (which means the same thing) to the value of their respective interests.

"With reference to the costs prior to the hearing, the court might I presume either follow the old rule of the court and give no costs, or take the statutory rule and apportion these in the same way as the subsequent costs, and I think the latter the preferable course" (y).

The present section is supplemented by two rules of practice, 1187 and 1195:—

Commission to be allowed in lieu of taxed costs in administration and partition.

1187. In all actions or proceedings instituted for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff, each person properly represented by a solicitor, and entitled to costs out of the estate—other than the creditors not parties to the action or proceeding

(x) *Mowat, V.C.*, in *Harkness v. Conway*, 12 Gr. 449 (1866). See further, *Bernard v. Jarvis*, 1 Chy. Ch. 24 (1859).

(y) *Mowat, V.C.*, in *Cartwright v. Diehl*, 13 Gr. 360 (1867).

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—shall be entitled to his actual disbursements in the action or proceeding, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned in the action or proceeding, which commission shall be apportioned amongst the persons entitled to costs as the Judge or Master thinks proper. Such commission shall be as follows :

On sums not exceeding \$500 .....	20	per cent.
For every additional \$100 up to \$1,500 ...	5	"
For every additional \$100 up to \$4,000 ...	3	"
For every additional \$1,000 up to \$10,000. 2½		"
For every additional \$1,000 .....	1	"

and such remuneration shall be in lieu of all fees, whether between "party and party," "as between solicitor and client," or "between solicitor and client." Chy. O. 643.

*Scope of the rule* :—In *Re Stuebing* (z) Boyd, C., says :—"The scope of the order referred to (a) is, as I interpret it, merely to aid in fixing the remuneration to be given in the cases to which it applies. It is not intended to do strict justice in every or any case, but is only a sort of rough and ready means of fixing costs without taxation. In some cases, perhaps not a few solicitors suffer some injustice by its operation. The compensation allowed is, I have no doubt, often less than it ought to be, if taxed according to the usual tariff. Here it happens to be liberal. But that is not *per se* a reason for reducing the commission, or directing the delivery and taxation of a bill in its stead, nor is a low or inadequate compensation any reason for increasing the commission, or directing payment by a taxed bill. In the common phrase you have to take the fat with the lean."

*Method of reckoning and apportioning the commission on a sale* :—The commission is to be reckoned not upon the whole purchase money, but upon the amount realized, *i.e.*, the balance of the purchase money, being the actual value of the estate or interest of the intestate (or other owner)

(z) 10 P. R. 236 (1884).

(a) *i. e.* the present rule.



in the land in question (b). The commission is to be divided into equal fractional parts, and allotted in proportion to the work done and responsibility involved (c). Questions of allotment may be raised without notice of appeal on a motion for distribution (d).

*Discretion as to costs:*—Where, after an order under G. O. 640 (C. R. 989) by the Master at Brampton, County of Peel, a motion was made for a sale of land in another county, the existence of said land being known at the time of making the order, and it was held that the case was within the scope of Order 641 (C. R. 990), it was also held that the case was a proper one for the exercise of the discretion of the Court or Judge, reserved under Order 643 (the present rule 1187) and costs of the application were allowed exclusive of the commission fixed by the Order (e).

*Costs of guardian:*—In the apportionment of the commission under rule the Court seems to look with favor on the guardian of infants. Thus in *Cameron v. Leroux* (f), where the Master at London out of \$300 commission appointed to the plaintiff's solicitor \$235, and to the guardian \$25; but the guardian complained and expressed his willingness, without prejudice, to accept \$50, his offer was considered reasonable by Proudfoot, J., who said:—"There is no doubt that in such cases the greater part of the work has to be done by the plaintiff and that he should receive the larger share of the commission. But I do not think that the sum allotted to the guardian should be measured

(b) *Re McColl*, 8 P. R. 480 (1881).

(c) *Dodge v. Clapp*, 8 P. R. 388 (1880).

(d) *Ib.* For further cases as to costs and commission, see *Campbell v. Campbell*, 8 P. R. 159 (1879), *disbursements*; *Re Fleury*, 9 P. R. 87 (1881), *lump sum*; *Re Hague*, 12 P. R. 119 (1887), *moderation of a bill of costs*; *Hendricks v. Hendricks*, 13 P. R. 79 (1889), *jurisdiction of local master*; *McKay v. McKay*, 8 P. R. 334 (1880), *costs of administrator defending*.

(e) *Clark v. Clark*, 8 P. R. 156 (1879).

(f) 9 P. R. 304 (1882).

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only by the work done in the Master's office. It is probable that the Local Master may not be aware of, or may not fully understand or value, the kind of work devolving on the guardian in such cases out of Court. But the Judges of this Division are well acquainted with it, and know the responsibility incurred by the guardian, that he has to acquaint himself with all the facts of the case, which his clients cannot give by reason of their infancy, and which have to be gathered from the relatives, and in many cases from other and more impartial sources. He has not, as in the ordinary case of a solicitor for an adult, merely to carry out his clients' wishes, but he has to inform himself of what is best for them, and to decide for them."

Where infants had been improperly joined as plaintiffs, it was ordered that the guardian's commission be fixed by the Master as if he had been engaged in the suit from the beginning (*g*).

*Consolidated Rule 1195*:—By analogy to the recent case of *Moon v. Caldwell* (*h*) the costs of unnecessary proceedings taken, where a motion for partition under C. R. 989 would have been sufficient, may be taxed off under C. R. 1195, which is as follows:—

1195. The Court or Judge may, at the hearing of any action or matter, or upon any appeal, application or proceeding in any action or matter in Court or in Chambers, and whether the same is objected to or not, direct the costs of any writ, pleading, petition, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed; or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof, as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length. In such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case

Disallow-  
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of unneces-  
sary pro-  
ceedings.

(*g*) *Brown v. Brown*, 9 P. R. 245, (1882).

(*h*) 15 P. R. 159 (1893).

where such question shall not have been raised before and dealt with by the Court or a Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any judgment or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so. See Chy. O. 71. J. A. Rule 435; App. O. 10.

*Operation of rule*:—The judgment of Boyd, C., in the above case, which was one of administration, shews the working of the rule: "The taxing officer has disallowed to the plaintiff the extra costs occasioned by his having issued a writ instead of obtaining an order for administration under Rule 965. Such was the course adopted by the direction of the Court in *Sovereign v. Sovereign*, 15 Gr. at p. 564, and *Sullivan v. Harty*, 9 P. R. 500, and such was was the limited direction given here on further directions embodying the agreement of counsel, viz., that it was to be left to the officer to say whether the less expensive method of obtaining administration by a summary order should have been adopted by the plaintiff, and if it should, then to tax the costs of the plaintiff accordingly."

*Unnecessary proceedings by next friend*:—Where a partition suit was brought by infants to effect a sale which might have been proceeded with by the mortgagee, who was willing to consider the interests of the infants, Blake, V.C., said: "The property must therefore be sold to realize the claims of the mortgagee, and I am asked to sanction the sale by the process of this Court, which will involve the expenditure of a very considerable amount of money, rather than by the mortgagee in the ordinary way. I cannot see what advantage will accrue to the infants by proceedings taken in this Court." Accordingly he dismissed the bill with costs against the next friend (i).

Applica-  
tion of pro-  
ceeds.

56. The proceeds of the sale, after deducting all costs, shall be divided among the parties whose rights and interests have been sold, in proportion to their respective rights in the pre-

(i) *Carroll v. Carroll*, 23 Gr. 438 (1876).

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mises; and the shares of such as are of full age shall be paid to them by the real representative, and, in the case of infants, unknown or absent parties, shall be invested for them in the name of the real representative and his successors in office, until lawfully claimed by them or their legal representatives; and the real representative may, in his discretion, require all or any of the parties, before they receive any share of the moneys arising from the sale, to give security to his satisfaction that they will refund the said shares with interest thereon in case it should thereafter appear that such parties were not entitled thereto. R. S. O. 1877, c. 101, s. 53.

In *Arnold v. Hind (j)*, a suit for partition, the greater part of the property, the subject of the partition, had been sold under the decree of the Court, but portions of it still remained unrealized. It appearing that all prior charges upon the property (such as the costs of the various parties to the suit, etc.) had been paid, and that the unrealized property was far less in value than the amount for which one of the co-owners (the plaintiff) was entitled to credit, in account with the other co-owners, on a petition by the plaintiff, an order was granted, vesting all the unrealized property in him.

*"And in the case of infants," etc.*—When lands are sold for the purpose of effecting a partition the share of an infant retains its character of realty (*k*).

57. All securities shall be taken in the name of the real representative and his successors in office, and the real representative shall keep, and see to the due collection of such securities. How securities taken.  
R. S. O. 1877, c. 101, s. 54 (1).

58. The Court or Judge may, if it or he thinks fit, direct the interest, or an adequate portion thereof, accruing from time to time on any minor's share, to be applied towards his maintenance. Allowance for maintenance of infants.  
R. S. O. 1877, c. 101, s. 54 (2).

59. All investments of moneys received from sales under this Act shall be made in Dominion stock, or other public security of the Dominion of Canada, or of this Province. How moneys invested.  
R. S. O. 1877, c. 101, s. 55.

(j) 1 Chy. Ch. 252.

(k) *Thompson v. McCaffrey*, 6 P. R. 193 (1874); cf. *Campbell v. Campbell*, 19 Gr. 254 (1872).

Payment  
into Court.

60 (1) All moneys which may be from time to time payable in respect of sales under this Act, or of securities taken in the name of the Surrogate Judge shall be paid into some incorporated bank designated for this purpose, from time to time, by order of the Lieutenant-Governor in Council; or where there is no such bank, then into some incorporated bank in which public money of the Province is then being deposited.

Procedure.

(2) The money shall be so paid in to the credit of the matter in which the payment is made, with the privity of the clerk of the County Court, and in no other manner; and such money shall only be withdrawn or re-invested on the order of the Court or a Judge thereof, with the privity of the clerk of the Court.

Withdrawal.

Clerk to  
keep books  
and render  
statements.

(3) The clerk shall keep a book or books containing an account of all moneys paid in, and of the withdrawal thereof; and shall prepare in the month of January in every year a statement of all moneys so paid in and withdrawn, or re-invested respectively, and a statement of the condition of the various accounts upon the 31st day of the preceding December, and shall transmit to the Provincial Secretary and to the real representative a copy of the statement, with a declaration thereto annexed, made before a justice of the peace, notary public or commissioner for taking affidavits in the form following :—

Verifica-  
tion of state-  
ment by  
clerk.

I hereby solemnly declare that the annexed statement is a full and true statement of the moneys paid into the Court, to the credit of the real representative of the County of \_\_\_\_\_, under *The Partition Act*, during the year 18\_\_\_\_, and that it correctly shews the state of the various accounts therein mentioned upon the thirty-first day of December last.

(Signature)

A. B.,

Clerk.

Subscribed and declared before me at  
this \_\_\_\_\_ day of January, 18\_\_\_\_.

C. D.,

Commissioner for taking affidavits,  
or as the case may be.

Books to  
be open for  
inspection.

(4) The book or books so to be kept shall be open for inspection within office hours; and the clerk shall give a certificate of the state of any account or an extract therefrom at the desire of any party interested, or his solicitor, on payment to the clerk of the sum of twenty cents for such inspection or certificate and the sum of ten cents per folio for such extract. R. S. O. 1877, c. 101, s. 56; 48 V. c. 10, s. 1.

Fees for  
extracts,  
etc.

*Delay in payment into Court*:—Where, in a partition suit, the mortgagors of an undivided share became the purchasers, but did not pay the purchase money into Court until long after the day named in the Master's report, it

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was held that the mortgagee, though a party to the suit, was entitled to interest at the rate reserved in the mortgage until notice of such payment into Court (*l*).

61. (1) All investments made prior to the 23rd day of January, 1869, on mortgage of real estate, and all acts and proceedings before said day done and performed, by virtue of the Partition Acts then in force, by any real representative shall be and the same are hereby declared valid and effectual.

Investments before 23rd Jan., 1869, declared valid.

(2) The successors in office, or any of them, of any deceased or other real representative, or any real representative for the time being, shall be and each of them is hereby duly empowered, upon payment having been made to any predecessor or himself in full of any sum or sums of money secured by mortgage, by virtue of this or any former *Partition Act*, to any predecessor or deceased predecessor in his lifetime, or to any successor or successors in office, as such Surrogate Judge and real representative, or to himself, to execute and grant all necessary releases and discharges of the same in manner and form provided by *The Registry Act*. R. S. O. 1877, c. 101, s. 57.

Releases and discharges.

Rev. Stat. c. 114.

62. The Judge or Junior or acting Judge of the County Court for the time being shall in case of the decease or absence of the proper Surrogate Judge, be and he is hereby vested, for the time being, with all the functions, powers and authorities for the county, of the person hereby appointed the real representative, and shall perform the duties thereof till the appointment of or return of the Surrogate Judge. R. S. O. 1877, c. 101, s. 58.

Junior or acting Judge of County Court to have jurisdiction.

*The Surrogate Courts Act*, R. S. O. 1887, c. 50, contains the following provision :—

6. The Senior Judge of the County Court in every county shall be *ex officio* Judge of the Surrogate Court for the county; and in case of the illness or absence or at the request of a Judge of a Surrogate Court, or in case the office of Senior Judge is vacant, the Junior or acting Judge or the Deputy Judge (if any) of the County Court, shall have all the powers and privileges and perform all the duties of the Judge of the Surrogate Court. R. S. O. 1877, c. 46, s. 6.

Judges of County Courts to be *ex officio* Judges of Surrogate Courts.

63. Proceedings under this Act shall not abate or be suspended by any death or transmission or change of interest, but in any such event, if known, the Court or Judge may require

Deaths, transmission or change of interest.

(*l*) *McDermid v. McDermid*, 7 P. R. 457 (1879).

notices to be given to persons becoming interested, or may make such order for carrying on the proceedings, or otherwise, in relation thereto, as may be just. R. S. O. 1877, c. 101, s. 59.

**Cf. notes to section 39.**

Amendment of proceedings.

64. The Court or a Judge shall have the same powers of amendment of all or any of the proceedings under this Act, as are possessed by the Court or a Judge in ordinary actions and proceedings pending in the Court. R. S. O. 1877, c. 101, s. 60.

**Cf. C. R. 326, 390, 421-433, 444-446, 585 and 1216.**

Adding parties.

65. In case at any time during the course of the proceedings it appears that any person not already a party thereto has any interest in the land, the Judge may, upon such terms as to him seem just, order such person to be named as a party, and served with notice of the proceedings, and from the time of the service of the order, the said party shall be bound by the proceedings in the same manner as if he had actually been made a party to the same. R. S. O. 1877, c. 101, s. 61.

**Cf. sections 10, 21 and 44, *supra*.**

Powers of Judge in Chambers.

66. A Judge in Chambers shall have equal power and jurisdiction with the full Court in all proceedings under this Act, as fully as if specially named therein, except where the word "Court" is in this Act used alone. R. S. O. 1877, c. 101, s. 62.

**The Master in Chambers has no jurisdiction in partition, C. R. 30 (11).**

Where affidavits, etc., to be deposited, etc.

67. All affidavits, orders, reports and other papers and documents filed with any deputy clerk of the Crown or deputy registrar, during the progress of any proceeding under this Act, shall be by him immediately thereafter transmitted to the registrar or clerk of records and writs, or other proper officer of the Division of the High Court in which the petition has been filed, as the case may be, to be preserved and safely kept as muniments of title. R. S. O. 1877, c. 101, s. 63.

An account of unclaimed moneys to be published yearly.

68. In the month of January in each year the real representative, the registrar, the clerk of records and writs, or other officer of the Court having in any case the custody of any moneys, bonds, mortgages, securities or investments arising from the sales of such estates for the benefit of any unknown, absent, infant, or lunatic parties, where no claim has been made on their behalf for any interest or principal of such investments during the preceding year, shall cause to be published in the Ontario Gazette and a weekly or daily paper

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published in the county in which the lands or any part thereof are situate, or if no such paper is published therein then in a daily or weekly paper published in the next adjoining or nearest county where such paper is published, weekly for the period of four weeks, a statement of the securities or investments remaining unclaimed, shewing the name of the intestate party, the amount unclaimed, and the property from which the claim has arisen; and such statement shall be verified by the real representative, clerk, or other officer aforesaid under oath; and a copy thereof shall be filed among the records of the Court. R. S. O. 1877, c. 101, s. 64.

The following amendments have been passed :—

51 VICT. CAP. 16.

An Act to amend *The Partition Act*.

[Assented to 23rd March, 1888.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Section 68 of *The Partition Act* is hereby amended by adding thereto the following sub-sections :—

Rev. Stat.  
c 104, s. 68,  
amended.

(2) In case no claim is made to such moneys, bonds, mortgages, securities or investments by the person entitled thereto within six months after the publication of such statement, the said moneys, and all sums as they become due and are paid under the said bonds, mortgages, securities or investments, shall be paid by the real representative upon the certificate of the inspector of legal offices to the accountant of the Supreme Court of Judicature for Ontario, to be placed by him to the credit of the matter in which the said moneys are held, such moneys to be received and paid out to the parties entitled pursuant to the order of partition and report of the real representative, as if the matter had been originally carried on in the High Court of Justice.

Disposition  
of  
unclaimed  
moneys.

(3) The real representative, in making such payments into Court, as aforesaid, shall forward with the same an office copy of the order for partition and his report thereunder, together with the said certificate of the inspector of legal offices which shall set forth that he has inquired into the proceedings taken in the matter and that they have been duly taken according to the provisions of this Act, and that in his opinion it is a proper case in which the moneys should be paid into the accountant's office.

## 53 VICT. CAP. 28.

An Act to amend *The Partition Act*.

[Assented to 7th April, 1890.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Section 68 of *The Partition Act* is amended by adding the following sub-section thereto :—

Rev. Stat.  
c. 104, s. 68,  
amended.

Dispens-  
ing with  
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Rules and  
orders.

Rev. Stat.  
c. 44, ss. 105,  
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(2) In any case where, in the opinion of the inspector of legal offices, such publication is an unnecessary expense, or the expenses would not be justified by reason of the fund or estate being small, the real representative, clerk or other officer aforesaid, upon obtaining the direction of said inspector, may dispense with the publication above provided for upon such terms as said inspector may direct.

69. The Judges of the Supreme Court, acting under sections 105 and 108 of *The Judicature Act*, shall make such tariff of fees, Rules and Orders for the proceedings on petitions under this Act as they may deem expedient and advisable. R. S. O. 1877, c. 101, s. 65.

See notes to sections 8 and 55, *supra*.

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## THE SHORT FORMS ACTS.

The first two of the Short Forms Acts were the invention of Lord Brougham. The Act (*a*) which is now our cap. 105 was passed in England in 1845, and repealed by the Conveyancing Act of 1881 (*b*). In the Jurist of Sept. 20th, 1845 (*c*), appeared an article criticising the Act as a "parliamentary short cut," and a "crude piece of trifling," generally calculated to "increase the difficulty of the unfortunate conveyancer's position." The same article however gives us the clue to the question why the Short Forms Acts have been so despised by English conveyancers and so gladly adopted by our own: "The first observation that occurs is, that, so far as concerns the attainment of brevity, the Act seems adapted only to meet the case *which is the least frequent occurrence*, viz., that of a mere conveyance of the freehold from one or more vendors to one or more vendees, where there is no complication of interests in the vendors, and nothing in fact to disturb or clog the clear stream of title from A. to B." The fact that in Ontario the above case is by no means of the least frequent occurrence, has doubtless been one cause of our adherence to Lord Brougham's device.

Dart in his Vendors and Purchasers (*d*) is equally severe: "Certain short forms authorized by Acts passed in the session of 1845 have, by the universal consent of the profession, been consigned to a deserved oblivion (*e*).

"Such enactments are either unnecessary or mischievous; unnecessary, if the parliamentary form would, if unauthorized by parliament, merely express in fewer words the

(*a*) 8 & 9 V. c. 119 (Imp.).

(*b*) 44 & 45 V. c. 41 (Imp.), 2nd Sched. Part III.

(*c*) 9 Jur. Part II. 333.

(*d*) 5th ed. 504.

(*e*) Referring to 8 & 9 V. c. 119 and c. 124.

meaning of the forms in ordinary use; and mischievous, if an unnatural and secondary meaning is given by the Statute to words which are *prima facie* clear and intelligible; for the effect is to induce not merely uncertainty, but positive misconception, in the mind of the unprofessional reader. For instance, a lessee who has, in the usual way, covenanted not 'to carry on any trade or business' upon the demised premises, may feel a reasonable and saving doubt whether he is safe in using them for a school; but, unless more addicted than is customary to the perusal of Acts of parliament, he probably will scarcely suspect that such an occupation is forbidden by an engagement not to 'use premises as a shop;' which is, nevertheless, the statutory equivalent to the ordinary covenant (*f*). If brevity be the only or the predominant desideratum in a legal document, it would be quite possible, with the aid of the legislature, to express the greater part of an ordinary assurance, algebraically; which would at least have this advantage, viz., that a person who had entered into covenants *X. Y. Z.*, would hardly venture to act upon his own ideas as to the unknown value and signification of these mysterious letters, without consulting the interpretation clause of the Statute to which they owed their legal efficacy."

This algebraic criticism which Dart used half in irony, has been applied in our courts with considerable force to the Act respecting Short Forms of Mortgages (*g*), which offends much more than the original Acts devised by Brougham, in giving "an unnatural and secondary meaning to words *prima facie* clear and intelligible." Thus in *Clark v. Harvey* (*h*), Street, J., says:—"The meaning attached by the forms in the second column to those given in the first column, goes in many of the instances so far beyond the natural meaning of the words used in the first

(*f*) Our Legislature has wisely omitted this covenant from our cap. 106.

(*g*) R. S. O. 1887, c 107.

(*h*) 16 O. R. 166 (1888).

(*i*) Cf. Barry  
11 A. R. 537 (1888)  
(*j*) 13 C. L. 7  
(*k*) L. R. 17  
(*l*) L. R. 13

column that I think the latter should be treated more as symbols to which a particular and extended meaning is given by the Act, than as forms of words with which the persons using them are to be at liberty to tamper at will; in short, that if the legislature had chosen to say that "X. Y." should, when used in a mortgage purporting to be made under this Act, have attached to them the meaning of the first and second clauses in the second column, the parties to a mortgage would not be at liberty to leave out the "Y." and then attribute to "X." the meaning of the first clause; and that as no word in the first column has attributed to it, apart from its fellows, any particular meaning, we are not at liberty to leave out any word from the first column, and say that the form in the second column is still applicable (i)."

An instance of the extent to which this strictness of construction may be logically carried is to be found in a recent article in the Canadian Law Times by Mr. A. E. O'Meara (j). After reviewing our Canadian cases under the Short Forms Acts in the light of the principles laid down in "two English cases of undoubted authority, viz., *Ex parte Stanford* (k) and *Thomas v. Kelly* (l)," Mr. O'Meara says: "The result to which this reasoning leads us is that the use of the description 'party of the first part,' etc., in a conveyance is not in accordance with the Act. It would follow from this that the usual covenant 'that the said party of the third part shall have quiet possession of the said lands free from all incumbrances' must be construed as an absolute covenant."

Now there are two considerations which appear entirely to escape the attention of those who proceed to carry to its extreme limit the strict construction of these Acts. The

(i) Cf. *Barry v. Anderson*, 18 A. R. 247 (1891), *Re Gilchrist and Island*, 11 A. R. 537 (1886).

(j) 13 C. L. T. 25 (1893).

(k) L. R. 17 Q. B. D. 259 (1886).

(l) L. R. 13 App. Cas. 506 (1888).

first consideration is that, while in England the Short Forms Acts immediately fell into disuse and contempt, on the other hand in Upper Canada the same Acts were eagerly laid hold of by our conveyancers and have remained in constant and general use; that this constant use argues something in those Acts peculiarly suited to our special needs in this province; and that therefore every effort should be made to augment rather than cripple the operation of the Acts in question. The second consideration is that some of the clauses that are from time to time considered in connection with these Acts, such as the covenant mentioned in Mr. O'Meara's article, and the power of sale clause on one month's default (*m*), have for a long time been in general use among our conveyancers as *Clauses under the Short Forms Acts*, and understood as having the full benefit of those Acts; that the practice of conveyancers is law, and that it is high time to judicially recognize that practice as existing in Ontario in connection with those Acts.

Brougham's Acts had an important section with reference to the costs to be allowed for drafting conveyances. This section formerly appeared in our Acts respecting Short Forms of Conveyances and Mortgages, but now is to be found in R. S. O. 1887, c. 147, as follows:—

52. "In the absence of any general rule and so far as any such general rules do not apply the taxing officer in taxing any bill for preparing and executing any deed under chapters 105, 106 and 107, of these Revised Statutes, in estimating the proper sum to be charged therefor, shall consider not the length of such deed but the skill and labour employed and responsibility incurred in the preparation thereof." R. S. O. 1877, c. 102, s. 5.

While the economising in solicitor's fees was one of the main objects of the Short Forms Acts, still in Ontario an equally important economy has been in the saving of registration charges, which increase with the number of folios in an instrument (*n*).

(*m*) See *Barry v. Anderson*, 18 A. R. 247 (1891); *Re Green & Artkin*, 14 O. R. 697 (1887).

(*n*) 56 V. c. 21, s. 111.

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R. S. O. 1887, CHAPTER 105.

An Act respecting Short Forms of Conveyances.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows :—

1. Where the words following occur in this Act, or in the Schedules thereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :

Interpretation.

(1) "Lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, or any undivided part or share therein, respectively.

"Lands."

(2) "Party" shall mean and include any body politic, or corporate, or collegiate, as well as an individual. R. S. O. 1877, c. 102, s. 1.

"Party."

Cf. the definitions here with those in R. S. O. 1887, c. 100, *supra* ; and see notes thereunder.

2. Where a deed expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in column one of Schedule B hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of said Schedule B, and distinguished by the same number as is annexed to the form of words used in the deed ; but it shall not be necessary, in any such deed, to insert any such number. R. S. O. 1877, c. 102, s. 2.

Where words of column 1 of Schedule B are employed the deed to have the same effect as if the words in column 2 were inserted.

3. Any deed or part of a deed which fails to take effect by virtue of this Act, shall, nevertheless, be as effectual to bind the parties thereto, as if this Act had not been made. R. S. O. 1877, c. 102, s. 3.

Deeds failing to take effect under this Act to be as valid as if Act not made.

4. Every such deed, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, under-woods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and

Deed to include all houses, etc., and the reversion and all the estate, etc.



appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances. R. S. O. 1877, c. 102, s. 4.

The present section 4 is identical with section 4 in the Act respecting Short Forms of Mortgages (o). Its language is very comprehensive. Thus in *Winfield v. Fowlie* (p), Armour, J., speaks of "those very wide words," and Wilson, C.J., speaks of "the very extensive language of the statutory form;" and it was held by these Judges that where a parcel of land was purchased about 200 feet distant from Georgian Bay, and a shingle mill was erected out in the water and connected by a tramway with the land so purchased, the mill and machinery became part of the realty and passed under a mortgage and a grant of such land executed under the Short Forms Acts.

Schedules,  
etc., to form  
part of Act.

5. The Schedules hereto, and the directions and forms therein contained, shall be deemed parts of this Act. R. S. O. 1877, c. 102, s. 6.

## SCHEDULE A.

### FORM OF CONVEYANCE UNDER SECTION 2.

This indenture made the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_ in pursuance of *The Act respecting Short Forms of Conveyances*, Between (here insert names of parties and recitals, if any,) Witnesseth, that in consideration of \_\_\_\_\_ dollars, of lawful money of Canada, now paid by the said (grantee) to the said (grantor) the receipt whereof is hereby by him acknowledged, he the said (grantor) doth grant unto

(o) Chap. 107, *infra*; see also the notes on s. 12, p. 45, *supra*.

(p) 14 O. R. 102 (1887).

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the said (grantee) in fee simple (*or otherwise as the case may be*) all, etc.,  
(*parcels*)

(*Here insert covenants, or any other provisions.*)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

R. S. O. 1877, c. 102, Sched. A.

### SCHEDULE B.

(*Section 2.*)

#### DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "Covenantor" or "Covenantee," or "Releasor" or "Releasee," "Grantor" or "Grantee," any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into, or annex to, any of the forms in the first column, any express exceptions from, or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Such parties may add the name or other designation of any person or persons, or class or classes of persons, or any other words, at the end of form two, of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons, or class or classes of persons, or of all persons whomsoever; and in every such case the covenants two, three and four, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons, so named.

*Schedule B. directions:*—The effect of these directions which are similar to those in cap. 107, *infra*, will be found discussed in the cases under that chapter, more especially in *Re Gilchrist & Island* (q), and *Clark v. Harvey* (r).

*Of the covenants generally:*—Under a general agreement to sell a fee simple estate, free from incumbrances,

(q) 11 O. R. 537 (1886).

(r) 16 O. R. 159 (1884).

the vendor is, in the absence of express stipulation to the contrary, bound to enter into certain "covenants for title;" the usual covenants being that the vendor is seised and has power to convey in fee, for quiet enjoyment, that the estate is free from incumbrances, and for further assurance (s). The vendor, if he was himself a purchaser for valuable consideration, delivering or covenanting to produce his title deeds, covenants against his own acts only; but a vendor who has acquired the property otherwise than by purchase, covenants against the acts of his predecessors in title as far back as the last purchase for value (t).

The effect of covenants for title as operating an estoppel will be found discussed in the notes to the fifth clause in the Schedule to cap. 107, *infra*.

### FORMS OF COVENANTS.

#### COLUMN 1.

1. The said (covenantor) covenants with the said (covenantee).

2. That he has the right to convey the said lands to the said (covenantee) notwithstanding any act of the said (covenantor)

#### COLUMN 2.

1. And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said covenantee, his heirs, executors, administrators and assigns, in manner following, that is to say:

2. That for and notwithstanding any Act, deed, matter or thing by the said covenantor done, executed, committed or knowingly or wilfully permitted or suffered to the contrary, he, the said covenantor, now hath in himself good right, full power, and absolute authority to convey the said lands, and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent of these presents.

*Covenant 2. Covenant for seisin*:—The old covenant for seisin, or, as it was called, the covenant "for title" is

(s) See *Church v. Brown*, 15 Ves. 263, 264 (1808).

(t) *Ib.*, see also *Lloyd v. Griffith*, 3 Atk. 264 (1745); *Wakeman v. Duchess of Rutland*, 3 Ves. 233, 504 (1797); *Gamble v. McKay*, 7 C. P. 319 (1858); *Scarlett v. Canada Co.*, 1 Chy. Ch. 90 (1860).

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(y) Carr v.  
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practically included in the covenant for right to convey (*u*) and has been superseded by the latter.

*Scope of covenant for right to convey*:—"The covenant extends to acts done, such as the execution of deeds, and also to things omitted or knowingly suffered; and would therefore appear to cover cases such as bankruptcy, or becoming insolvent, or the omission to bar an estate tail, but not to anything happening by the act of God, or which the covenantor could not prevent" (*v*).

*What constitutes a breach*:—"It is not a breach that the covenantor's wife is alive and has not barred her dower" (*w*).

A covenant that the vendor and some other person have right to convey is broken when that other person is under personal disability (*x*).

"No example can be found for an action for breach of covenant for title having been brought on such grounds; that is where the grantor has really the right in him, but his grantee merely met with obstruction and delay in gaining possession" (*y*).

Where the legal estate had fully passed, but there were questions raised of equitable rights, it was held that, there being no actual disturbance or eviction, an action would not lie on the covenant for title in a court of law (*z*). The case was different as to an action on the covenant for quiet enjoyment (*a*).

(*u*) *Howell v. Richards*, 11 East 642 (1809).

(*v*) *Bythewood & Jarman*, 4th Ed., Vol. V. 238, citing *Stannard v. Forbes*, 6 A. & E. 572 (1837); *Hobson v. Middleton*, 6 B. & C. 295 (1827).

(*w*) *Wilson v. Biggar*, 26 U.C.R. 85 (1866); *Thornhill v. Jones*, 12 U.C.R. 231 (1854); *Dack v. Currie*, 12 U. C. R. 334 (1854); see also *Hoyt v. Widderfield*, 5 U. C. R. 180 (1848); *Bower v. Brass*, E. T. 5 Vic. (Rob. & Jos. 882).

(*x*) *Nash v. Ashton*, Jones T. 195.

(*y*) *Carr v. Dunn*, 9 U. C. R. 246 (1852), following *Jerrit v. Weare*, 3 Price, 575.

(*z*) *Brunskill v. Wilson*, 25 U. C. R. 248 (1836). See also *Shire v. Gates*, 21 U. C. R. 419 (1862).

(*a*) *Trust & Loan Co. of Upper Canada v. Covert*, 30 U. C. R. (1870).

*Covenant 2. Covenant may be broken as soon as made:—*  
“As to the covenant for title, right to convey, etc., the Supreme Court in *Platt v. Attrill*, 10 S. C. R. 425, has decided that the defendants not having in the grants made by them, under which Attrill claimed, made any reservation of the easement subsequently granted to Patterson, that they had no right to grant that easement to him. The defendants were not parties to that decision and are therefore not bound by it, but it being a declaration of our highest court of the construction of these very deeds, and of the law applicable to them, I consider myself bound by their decision. The covenant then was broken as soon as made, and the plaintiff would be entitled to such damages as accrued during the life of S. Platt” (b).

*What damages recoverable for breach:—*“The damages recoverable upon a breach of the covenant for title, have been considered in a number of cases in our courts, and are placed upon an intelligible footing. From a remark of the late Sir J. B. Robinson in *Clark v. Robertson*, 8 U. C. R. 370, 374, that the covenant of seisin can be but once broken, and but one remedy lies upon it, it may be inferred that he had adopted the view of the American Courts, that it was not a continuous covenant, but in subsequent cases the English rule prevails, that it is a continuing covenant *Graham v. Baker*, 10 C. P. 426.

“In *Gibson v. Boulter*, 3 C. P. 407, it was held that in an action for breach of covenant for title and freedom from incumbrance when the incumbrance was much larger than the value of the land, that the measure of damages is the purchase money and interest. To the same effect is *Graham v. Leslie*, 4 C. P. 176. In *Graham v. Baker*, 10 C. P. 426, an action for breach of covenant for title,

(b) *Platt v. G. T. R.*, 12 O. R. 128 (1886). The Statutes of Limitations will begin to run from the date of execution, not of the discovery of the breach. *Short v. McCarthy*, 3 B. & Ald. 626 (1820); *Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39 (1854).

(c) *Platt v. G. T. R.*  
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(d) *Brenna*  
3 B. & Ad. 407

Richards, J., says, 'When there has been eviction, or the plaintiff has never got into possession of the land, and in consequence of the want of title never can; the purchase money, and the interest, where there is no fraud, is the measure of damages under the covenants set out in the declaration.' He also treats the covenant as a continuing one (p. 429), following *Kingdon v. Nottle*, 4 M. & S. 53; *Snider v. Snider*, 13 C. P. 157, and *Bannon v. Frank*, 14 C. P. 295 follow *Graham v. Baker*.

"The rule so laid down is of comparatively simple application in case of eviction by superior title to the whole of the property, or of an incumbrance of greater value than the property. But where the defect of title applies only to part it may become somewhat more difficult. But the rule in such a case has been formulated by Gwynne, J., in *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, 257. 'In case the contract has been executed, but no title has passed at all, then on a covenant for seisin or good right to convey, he shall recover back his principal and interest, and expenses; but in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that estate, which has passed and that which the deed purported to convey, and which the grantor covenanted he had the right to convey'" (c).

Where the purchaser is dispossessed in an ejectment action by a person having paramount title he is allowed his costs of defending that action as damages in an action on the covenant for title (d), in addition to his purchase money and interest, even though he has not actually paid those

(c) *Platt v. G. T. R.*, 12 O. R. 128, (1886):—

The judgment in this case appears to have been varied in so far as to allow only nominal damages for breach of the covenant of title; but the principles here laid down do not appear to be affected: see the daily newspapers for March 20th, 1891.

(d) *Brennan v. Servis*, 8 U. C. R. 191 (1850), following *Smith v. Compton*, 3 B. & Ad. 407 (1832).

costs (*e*). But not so, where the costs are the consequence of the plaintiff's own act (*f*). Nor can he recover damages caused by his own neglect, *e.g.*, permitting a tax sale (*g*). Nor can he recover the amount paid by him on a compromise (*h*).

The measure of damages is the amount of purchase money paid, and interest thereon; no allowance to be made for improvements on the increased value of the land (*i*). The purchase money is that expressed in the deed as consideration, not necessarily that actually received (*j*).

*Nominal damages*:—The plaintiff is not entitled to substantial charges without showing an eviction or ouster from the premises conveyed, or some other facts which would entitle him to more than nominal damages (*k*). Where the vendor had afterwards acquired the outstanding title, it was held that a perfect title passed to the purchaser by estoppel, and only nominal damages were recoverable on the covenant (*l*).

*Who may sue on covenant*:—"I consider that a covenant for title, with the grantee and his assigns, is one which clearly runs with the land, as it equally would though assigns were not named; and that the grantee assigning his supposed estate, his assignee acquires a right to sue upon the breach of that covenant, and to recover damages

(*e*) *Stubbs v. Martindale*, 7 C. P. 52 (1857).

(*f*) *Forsyth v. McIntosh*, 9 C. P. 492 (1860); cf. *Parker v. McDonald*, 11 C. P. 478 (1862).

(*g*) *McCollum v. Davis*, 8 U. C. R. 150 (1851); cf. *Moore v. Haynes*, 27 U. C. R. 107 (1863); *Harry v. Anderson*, 13 C. P. 467 (1863).

(*h*) *Hart v. Bown*, 7 Gr. 97 (1859).

(*i*) *Clark v. Robertson*, 8 U. C. R. 370 (1852); *McKinnon v. Burrows*, 3 O. S. 590 (1833). But see R. S. O. 1887, c. 100, s. 20.

(*j*) See *Graham v. Leslie*, 4 C. P. 176 (1855).

(*k*) *Snider v. Snider*, 13 C. P. 157 (1863); *Graham v. Baker*, 10 C. P. 426 (1861); *Bannon v. Frank*, 14 C. P. 295 (1864); *Emery v. Miller*, Tay. 336; *Macdougall v. Macdonell*, 5 C. P. 355 (1856); *Brown v. O'Dwyer*, 35 U. C. R. 354 (1874).

(*l*) *Boulter v. Hamilton*, 15 C. P. 125 (1864); following *Doe Irvine v. Webster*, 2 U. C. R. 224 (1845).

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when he shows that the grantor had either no title or not a good title when the first deed was made by him . . . . I consider that upon a covenant for title, it is not essential that the person who sues as assignee should shew that a legal interest passed to him under the deed. His cause of action is that he has not the interest which he supposed he was acquiring, and which he would have had if the title of the covenantor who executed the first deed had been good " (m).

"It is the assignee of the fee . . . who represents the covenantee; not the tenant of a particular estate " (n). But an assignee of part of the land conveyed may sue upon the covenant and recover in proportion to his interest (o). Where a purchaser mortgages back to secure the purchase money he cannot sue the vendor for breach of covenant for good title, while the mortgage continues in force (p).

Where the defendant conveyed with absolute covenants to plaintiff who before action conveyed to one D: held, that the covenants ran with the land and the plaintiff could not sue, though they were broken as soon as made (q). But where objection had not been taken and he was acting for the benefit of the person entitled and obtained judgment the Court refused to interfere (r).

*Who may be sued*:—An action will not lie against the devisees of the covenantor (s).

(m) Robinson, C.J., in *Gamble v. Rees*, 6 U. C. R. 396, (1850); *Quere*, what would the effect be, if, at the time the original covenantor's deed was given a third party had been actually in adverse possession, or if the covenantee had been evicted before he made the deed to the assignee. *Gamble v. Rees*, was followed in *Scott v. Fralick*, 6 U. C. R. 511 (1850); cf. *Brown v. Hart*, 10 U. C. R. 228 (1853). See further *Rowe v. Street*, 8 C. P. 217 (1859); *Scriver v. Myers*, 9 C. P. 255 (1860).

(n) *Clark v. Robertson*, 8 U. C. R. 370 (1852).

(o) *Keyes v. O'Brien*, 20 U. C. R. 12 (1860).

(p) *Huyck v. McDonald*, 3 O. S. 292 (1833); *Rees v. Strachan*, 14 U. C. R. 53 (1856); *Proctor v. Gamble*, 16 U. C. R. 110 (1858).

(q) *Scriver v. Myers*, 9 C. P. 255 (1860).

(r) *Campbell v. Burley*, 19 U. C. R. 204 (1860).

(s) *Sickles v. Snyder*, 10 U. C. R. 209 (1853).

*Onus of proof*:—The onus of proof is on the covenantor to shew *prima facie* evidence of his estate in fee (*t*) except where he covenants only against his own acts (*u*).

*"Notwithstanding any Act of the said"*:—A point arose in *McKay v. McKay* (*v*), which illustrates at once the danger of using printed forms of conveyances without carefully examining them, and also the fact that the leaving out a portion of a statutory form of covenant may enlarge the sense of the covenant. Thus the deed, in this case, though purporting to be made in pursuance of the Short Forms Act had a covenant for title omitting the above words "*notwithstanding*," etc.; and the Court considered that though the covenant did not take effect under the statute relating to short forms of conveyances, not being in the form in column one of the schedule, nevertheless it bound the covenantor "according to its very words, its legal effect being that he is seised and has a right to convey in fee simple: *Brown v. O'Dwyer*, 35 U. C. R. 354." It appearing from the evidence, that the solicitor had some statutory deeds in the office in which the words "*notwithstanding*," etc., were omitted by mistake, and that it was the agreement that the plaintiff should have a deed with covenants as distinguished from a quit claim or deed without covenants, the Court ordered the deed to be reformed (*w*).

In *Brown v. O'Dwyer* cited above where the covenant for right to convey lacked these words "*notwithstanding*,"

(*t*) *Varey v. Muirhead*, Dra. 486 (1831); *Lemesurier v. Willard*, 3 U. C. R. 285 (1846); *Mills v. Wigle*, 22 U. C. R. 168 (1863); *McCullum v. Davis*, 8 U. C. R. 150 (1851); *Toland v. Bruce*, 8 U. C. R. 14 (1851).

(*u*) *McKinnon v. Burrows*, 3 O. S. 114 (1832). For further cases see *Vanderbury v. Vanalstein*, 5 O. S. 454 (1836); *Shanahan v. Sherrin*, 10 U. C. R. 600 (1853); *Dauphin v. Lesperance*, 14 C. P. 133 (1864); *Belyea v. Muir*, 5 P. R. 273 (1870).

(*v*) 31 C. P. 1 (1880).

(*w*) Citing *Rawle on Covenants for Title*, 4th Ed. 520-2; *Urmiston v. Pate*, 4 Cruise Dig. 4th Ed. 390; *Bree v. Holbeck*, Dong. 655; *Maynard's Case*, 2 Freem 1, 3 Swanst 651.

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etc., it was held that this omission did not make the succeeding covenants,—for quiet possession and further assurance, and that the covenantor had done no act to incumber,—absolute covenants, they being in the correct statutory form.

## COLUMN 1.

3. And that the said (covenantor) shall have quiet possession of the said lands.

## COLUMN 2.

3. And that it shall be lawful for the said covenantor, his heirs, executors, administrators, and assigns, from time to time and at all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess and enjoy the said land and premises hereby conveyed, or intended so to be, with their and every of their appurtenances; and to have, receive, and take the rents, issues and profits thereof, and of every part thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever of, from or by him the said covenantor, or his heirs or any person claiming, or to claim, by, from, under or in trust for him, them or any of them.

*Scope of covenant for quiet enjoyment* :—"The covenant for quiet enjoyment, whether with or without a partially restrictive covenant, has been regarded as a covenant to secure title and possession, and not to guarantee to the purchaser that he may lawfully use the land for any purpose not in the restriction" (x).

*What is a breach of the covenant?*—The gist of the matter is that a disturbance by the covenantor, or those lawfully claiming under him, is a breach; but a disturbance by any other is not a breach of this covenant. "Where the ordinary and lawful enjoyment of the . . . land is substantially interfered with by the acts of the [covenantor] or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected" (y). "I will only add that I am not aware of any instance of an action being sustained for the breach of a covenant for quiet enjoyment, where the grantor had that which he proposed to grant, and has done no act to disturb the

(x) *Dennet v. Atherton*, L. R. 7 Q. B. 326 (1872); cf. *Spoor v. Green*, L. R. 9 Exch. 108 (1874); *Ludwell v. Newman*, 6 T. R. 458 (1795).

(y) *Sanderson v. Mayor of Berwick-on-Tweed*, 13 Q. B. D. 551 (1884).

grantee in the possession of it. Here the grantor had demised to R., covenanting with him in the terms which amount to a re-grant of the right of, etc., . . . and the right so reserved he has granted to the plaintiff . . . R. did, what he did, *unlawfully*, and consequently the defendant's covenant with the plaintiff is not broken" (z).

*What constitutes an interruption?*—Where an action was brought for damages for breach of the covenant for quiet enjoyment, Proudfoot, J., said: "To take the covenant for quiet enjoyment first. To entitle the plaintiff to recover he must shew an interruption or obstruction of the easement. I apprehend it is not enough to say that were he to attempt to exercise it he would be obstructed, there must be an actual interruption or obstruction, equivalent to eviction in the case of a corporeal right. Now, in the present case, the grant to Patterson conveyed a right, not capable of any other reasonable construction, to build a dam across the river at the eastern extremity of the land conveyed to him, *i.e.*, at or just below the head gates of the original head race. But the plaintiff has never endeavoured to do so. The dam he built was much further up the stream and beyond the limits of the lands granted to Patterson.

"An interruption of such an easement would be a breach of the covenant for quiet enjoyment: *Pomfret v. Ricroft*, 1 Saund. 322; *Andrews v. Paradise*, 8 Mod. 318; and it seems rather absurd to say that before the plaintiff can bring his action he must go to a heavy expenditure, with the certainty that he will not be allowed to enjoy the easement. But until he attempts to enjoy it, it cannot be said that he is interrupted. Upon this ground I think the plaintiff's action must fail as to the covenant for quiet enjoyment" (a).

(z) *Jeffryes v. Evans*, 19 C. B. N. S. 267, 268 (1865).

(a) *Platt v. G. T. R.*, 12 O. R. 119 (1886); see same case at 11 O. R. 246, as to proper party to bring action after death of covenantee.

(b) *Byth*

## COLUMN 1.

4. Free from  
all incum-  
brances.

## COLUMN 2.

4. And that free and clear, and freely and absolutely acquitted, exonerated, and forever discharged, or otherwise by the said covenantor or his heirs well and sufficiently saved, kept harmless and indemnified of, from and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognizance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble and incumbrance whatsoever, made, executed, occasioned or suffered by the said covenantor or his heirs, or by any person claiming, or to claim, by, from, under, or in trust for him, them or any of them.

*What should be excepted from the covenants against incumbrances:—*"It is not usual to except tenancies from year to year at rack rent in a covenant which avers the freedom of the property from incumbrances; but as such a tenancy constitutes an interest in the land which does not pass by the conveyance, it is obvious that, if created by the vendor himself, or any other person to whose acts his covenants extend, the estate of a tenant from year to year ought to be excepted.

"Perhaps in no part of deeds has so much inaccuracy prevailed as in framing exceptions of this nature. Thus, while a tenancy though an interest created by the covenantor, has not been noticed, a great variety of incidents not created by him, as land tax, quit rents, manorial rights, etc., have not been unfrequently introduced. It is clear that no subsisting charge or outstanding interest needs to be noticed as an incumbrance, which was not created by the person to whose acts the covenant relates. The effect of referring to an incumbrance paramount the original estate of the vendor, has been held to render absolute covenants which otherwise would have been limited: *Howell v. Richards*, 11 East, 633. Where the covenants were absolute, as against the acts of all persons, and rents were mentioned among the incumbrances from which the estate was warranted, it was held that small quit rents were within the covenant: *Hammond v. Hill*, 1 Com. 180" (b).

(b) Bythewood & Jarman, 4th Ed., Vol. V., 242.

For effect of conveyance of an undivided half interest "free from all incumbrances," see *McCaskill v. McCaskill* (c). For right of mortgagee of purchaser to benefit of vendor's covenant to pay off incumbrances, see *Clark v. Bogart* (d). Cf. notes to covenant 7 *infra*.

## COLUMN 1.

5. And the said (covenantor) covenants with the said (covenantee) that he will execute such further assurances of the said lands as may be requisite.

## COLUMN 2.

5. And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise, and agree with and to the said covenantee, his heirs, executors, administrators and assigns, that he the said covenantor, his heirs, executors and administrators, and all and every other person whosoever having or claiming, or who shall or may hereafter have or claim, any estate, right, title or interest whatsoever in, to, or out of the said lands and premises hereby conveyed, or intended so to be, or any of them, or any part thereof, by, from, under or in trust for him, them, or any of them, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said covenantee, his heirs, executors, administrators or assigns, make, do, execute, or cause to be made, done or executed, all such further and other lawful acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the better, more perfectly, and absolutely conveying and assuring the said lands and premises hereby conveyed, or intended so to be, and every part thereof, with their appurtenances, unto the said covenantee, his heirs, executors, administrators and assigns, in manner aforesaid as by the said covenantee, his heirs, executors, administrators and assigns, his or their counsel in the law, shall be reasonably devised, advised or required, so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors or administrators only, and so as no person who shall be required to make or execute such assurances shall be compellable for the making or executing thereof, to go or travel from his usual place of abode.

"*Shall be reasonably devised (e), advised or required*": —*Hoyt v. Widderfield*, (f), was a case in which a covenant for further assurance, similar to the present one, was under discussion. The decision in this case certainly goes so far

(c) 12 O. R. 783 (1886).

(d) 27 Gr. 450 (1880).

(e) For distinction between *devise* and *advise* see *Stafford v. Bottorne*, Cro. Eliz. 298.

(f) 5 U. C. R. 180 (1848).

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## COLUMN

6. And the said (covenantor) covenants with the said (covenantee) that he will produce the title deeds enumerated hereunder, and allow copies to be made of them at the expense of the said (covenantee).

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(g) Macaulay.

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(i) Barclay.

as to lay it down that a sufficient conveyance must be tendered to the covenantor, and is also authority for the statement that the conveyance must be devised, *i.e.*, prepared by the covenantee (his heirs, etc.), or his counsel (*g*). The same case holds that the right of dower, which a woman has *during coverture*, is not an interest, the release of which the covenantee can require under the covenant for further assurance; after the death of her husband the assurance must then be tendered (*h*).

## COLUMN 1.

6. And the said (covenantor) covenantants with the said (covenantee) that he will produce the title deeds enumerated hereunder, and allow copies to be made of them at the expense of the said (covenantee).

## COLUMN 2.

6. And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said covenantee, his heirs, executors, administrators and assigns, that the said covenantor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request, costs and charges of the said covenantee, his heirs, executors, administrators or assigns, or his or their solicitor, agent or counsel, at any trial or hearing in any action or otherwise as occasion shall require, produce all and every or any deed, instrument or writing hereunder written, for the manifestation, defence and support of the estate, title and possession of the said covenantee, his heirs, executors, administrators and assigns, in or to the said lands and premises hereby conveyed, or intended so to be, and at the like request, costs and charges, shall and will make and deliver, or cause to be made and delivered, true and attested or other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds, by the said covenantee, his heirs, executors, administrators and assigns, or such person as he or they shall for that purpose direct and appoint.

No purchaser can be compelled to take a title unless he gets either the title deeds or documents which enable him to obtain the production of the deeds, *i.e.*, a covenant to produce them (*i*). If a vendor retains the deeds, and covenantants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for

(*g*) Macaulay, J., *dubitante*.

(*h*) Cf. *Dack v. Currie*, 12 U. C. R. 334 (1855); *Wilson v. Biggar*, 26 U. C. R. 85 (1866); *Bower v. Brass*, E. T. 2 V. Rob. & Jos. 882.

(*i*) *Barclay v. Raine*, 1 S. & S. 449 (1823).



production of the deeds (*j*). Where the purchaser of small lots, part of an estate sold by auction, has had no intimation that he could not have the deeds, he is entitled to attested copies at the expense of the vendor (*k*).

## COLUMN 1.

7. And the said (covenantor) covenants with the said (covenantee) that he has done no act to incumber the said lands.

## COLUMN 2.

7. And the said covenantor, for himself, his heirs, executors, and administrators, doth hereby covenant, promise and agree, with and to the said covenantee, his heirs, executors, administrators and assigns, that he hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby conveyed, or intended so to be, or any part or parcel thereof are, is, or shall or may be in any way impeached, charged, affected or incumbered in title, estate, or otherwise howsoever.

*Local improvement rates as incumbrances*:—In *Cumberland v. Kearns*, (*l*) an action was brought for the breach of this clause 7, and other covenants under rather peculiar circumstances. It seems that the defendant and others petitioned for certain local improvements, and the same were effected and a local improvement rate consequently imposed, as a charge upon the lands benefitted. The by-law creating the charge was passed before the conveyance to the plaintiff but the respective amounts for each parcel were appointed afterwards. It was held that an incumbrance had been created through the instrumentality of the defendant and within the meaning of the covenants against incumbrances.

"Different would be the conclusion if the taxes were imposed by municipal authority without the intervention of the defendant, in which case *Moore v. Hynes*, 22 U. C. R. 107, would be the governing decision. In such case the private owner is in no wise responsible for the imposition of the tax" (*m*).

(*j*) *Fain v. Ayers*, 2 S. & S. 533 (1826).

(*k*) *Boughton v. Jewell*, 15 Ves. 176 (1808).

(*l*) 17 A. R. 231 (1890); 18 O. R. 151. See further *Re Graydon and Hammill*, 20 O. R. 199 (1890), where the sale was not yet completed.

(*m*) *Ib.* 18 O. R. 162, *per* Boyd, C.

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## COLUMN 1.

8. And the said (releasee) releases to the said (releasee) all his claims upon the said lands.

(n) *Ib.* 1  
L. R. 5 Q. B.

"The final by-law distributing the assessment upon the several properties was not passed until after the conveyance to the plaintiffs, but that was only the necessary act for the completion of the proceedings which had been already taken at the defendant's instance" (n).

The measure of damages in the above case was considered to be a sufficient sum to remove the charge.

The following enactment has rendered it unnecessary to add the words "and subject to local improvement rates" to the exceptions usually made after the covenants for title; which addition had become a commonplace among our conveyancers after the above decision in *Cumberland v. Kearns*.

## 55 VIC. CAP. 42.

624*n*. Where local improvements benefitting real property have heretofore or shall hereafter be made under the provisions of the local improvement clauses of this Act the costs whereof, in whole or in part, have been charged upon or against the real property, the petitioning for or procuring to be made, or the making of any such improvements or the charging the costs thereof upon or against the real property, or the fact that they are a charge upon or against such real property, shall not be deemed to be a breach of the covenant by a vendor or person agreeing to sell, that he has done no act to encumber the real property, except to the extent that the annual or other payments in respect of such charge are in arrear, and unpaid, but this shall not affect or apply to any case already adjudicated upon or now pending in litigation. 54 V. c. 42, s. 35.

Local improvement charge and covenant against incumbrances.

## COLUMN 1.

8. And the said (releasor) releases to the said (releasee) all his claims upon the said lands.

## COLUMN 2.

8. And the said releasor hath released, remised and forever quitted claim, and by these presents doth release, remise and forever quit claim, unto the said releasee, his heirs, executors, administrators and assigns, all, and all manner of right, title, interest, claim and demand whatsoever in, to and out of the said lands and premises hereby granted, or intended so to be, and every part and parcel thereof, so as that neither he nor his heirs, executors, administrators or assigns shall nor may, at any time hereafter, have claim, pretend to, challenge or demand the

(n) *Ib.* 17 A. R. 290, per Osler, J.A., citing *Anderson v. Oppenheimer*, L. R. 5 Q. B. D. 602 (1880).

## COLUMN 1.

9. And the said (A. B.) wife of the said (grantor) hereby bars her dower in the said lands.

## COLUMN 2.

said lands and premises or any part thereof, in any manner howsoever, but the said releasee, his heirs, executors, administrators and assigns, and the same lands and premises shall from henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said releasor might or could have upon him in respect of the said lands, or upon the said lands.

9. And the said (A. B.) wife of the said grantor for and in consideration of the sum of            dollars of lawful money of Canada, to her in hand paid by the said grantee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said grantee, his heirs, executors, administrators and assigns, all her dower and right and title which, in the event of her surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be. R. S. O. 1877, c. 102, Sched. B.

It is noticeable that to the blank before "*dollars*" in column two, there is no corresponding blank in column one, so that the wife is in the position of releasing her dower for an unknown and, so far as the present Act is concerned, inexpressible consideration.

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An Act respecting Short Forms of Leases.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Where a deed made according to the form set forth in Schedule A, annexed to this Act, or any other deed expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in column one of Schedule B, hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of said Schedule B, and distinguished by the same number as is annexed to the form of words used in the deed ; but it shall not be necessary, in any such deed, to insert any such number. R. S. O. 1877, c. 103, s. 1.

Where words of column 1 of Schedule B are employed, the deed to have the same effect as if the words in column 2 were inserted.

2. Any deed or part of a deed which fails to take effect by virtue of this Act shall, nevertheless, be as effectual to bind the parties thereto, as if this Act had not been made. R. S. O. 1877, c. 103, s. 2.

Deeds failing to take effect under this Act to be as valid as if Act not made.

3. Every deed, unless an exception is specially made therein, shall be held and construed to include all out-houses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in any wise appertaining. R. S. O. 1877, c. 103, s. 3.

Deed to include houses, etc.

4. Unless the contrary is expressly stated in the lease, all covenants not to assign or sub-let without leave entered into by a lessee in any lease under this Act made after the 25th March, 1880, shall run with the land demised, and shall bind the heirs, executors, administrators, and assigns of the lessee whether mentioned in the lease or not, unless it is by the terms of the

Covenants to run with land.

lease otherwise expressly provided, and the proviso for re-entry contained in Schedule B to this Act shall, when inserted in a lease, apply to a breach of either an affirmative or negative covenant. 49 V. c. 21, s. 1.

The mischief aimed at by section 4 is to be found in *Lee v. Lorsch (a)*, which case left it extremely uncertain whether the covenant not to assign or sub-let ran with the land so as to bind the heirs, etc., and decided that the right of entry is for non-performance of covenants; that is to say, for *not* doing something which the lessee had engaged to do. The result of the present section is to make the covenant run with the land, and also apply to the case of the lessee *doing* something which he was not to have done.

The same subject is further pursued in the 5th direction *infra*.

## SCHEDULE A.

### (Section 1.)

#### FORM OF LEASE.

This indenture, made the            day of            , in the year of our Lord one thousand eight hundred and            , in pursuance of The Act respecting Short Forms of Leases, between            , of the first part, and            , of the second part, Witnesseth, that in consideration of the rents, covenants, and agreements hereinafter reserved and contained on the part of the said party (or parties) of the second part, his (or their) executors, administrators, and assigns, to be paid, observed, and performed, he (or they), the said party (or parties) of the first part, hath (or have) demised and leased, and by these presents do (or doth) demise and lease unto the said party (or parties) of the second part, his (or their) executors, administrators, and assigns, all that messuage or tenement situate (or all that parcel or tract of land situate), lying and being (here insert a description of the premises with sufficient certainty), To have and to hold the said demised premises for and during the term of            , to be computed from the            day of            one thousand eight hundred and            , and from thence forth next ensuing, and fully to be complete and ended. Yielding and paying therefor yearly and every year during the said term

(a) 37 U. C. R. 262 (1875).

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hereby granted unto the said party (or parties) of the first part, his (or their) heirs, executors, administrators, or assigns the sum of \_\_\_\_\_, to be payable on the following days and times; that is to say (on, etc.), the first of such payment to become due and be made on the \_\_\_\_\_ day of \_\_\_\_\_ next.

R. S. O. 1877, c. 103, Schedule A.

*Demise and lease*:—"It is laid down in the Touchstone, p. 160, that when a lease for years is made by the words demise (b), or grant, the law intends a covenant on the part of the lessor that the lessee shall quietly hold and enjoy, but no English case has yet decided that a similar intentment is to be made when the word 'lease' is alone used" (c).

"*To be computed, etc.*":—It is better in filling in the lease to put in the exact date as, e.g., "the first day of April, one thousand eight hundred," etc., rather than the more compendious form "the first day of April now next." This we learn from *Bell v. McKindsey* (d), where the lease was dated March 15th, 1862, but the lease was re-executed in July, 1862, and the term held to be computed from April 1st, 1863, instead of April 1st, 1862; leases, as other deeds, taking effect from delivery, not from date.

"*Yielding and Paying*":—In *McCallum v. Snyder* (e), under a lease dated 1st October, 1857, *habendum* for five

(b) Cf. *Saunders v. Roe*, 17 C. P. 344 (1867).

(c) *Draper, C.J.*, in *Ross v. Massingberd*, 12 C. P. 64 (1862). See further *Smart v. Stuart*, 5 O. S. 301, implied covenant for quiet enjoyment; *Harvey v. Ferguson*, 9 U. C. R. 431, effect of "lease and to farm let."

(d) 23 U. C. R. 162 (1863); 3 E. & A. 9. For cases as to time for payment under lease, see *Neal v. Scott*, 10 U. C. R. 361; *Joslin v. Jefferson*, 14 C. P. 260; *Huskinson v. Lawrence*, 26 U. C. R. 570; *Wilson v. MacNamara*, 12 U. C. R. 446, terms of payment a fact for jury; *Black v. Allan*, 17 C. P. 240, reference causing a postponement; *Brown v. McCarty*, 18 C. P. 451, pleadings contradicting legal effect of lease; *Nowery v. Connolly*, 29 U. C. R. 39, rent payable in kind; *Irwin v. Hunter*, 19 C. P. 391; *Peacey v. Ovas*, 26 C. P. 464, *Millmine v. Hart*, 4 U. C. R. 525, suspension of rent by implication from an agreement. As to payment in advance, see *Brown v. Blackwell*, 35 U. C. R. 239; *McCallum v. Snyder*, 10 C. P. 191; *Galbraith v. Fortune*, 10 C. P. 109, parol agreement to pay in advance; *Ryerse v. Lyons*, 22 U. C. R. 12, *Hortop v. Taylor*, 21 C. P. 56, *Cormack v. Dodds*, 32 U. C. R. 625, *Forge v. Reynolds*, 18 C. P. 110, effect on rent, payable in advance, of subsequent events by which rent to cease or be apportioned.

(e) 10 C. P. 191 (1860). Cf. *Eckhardt v. Raby*, 20 U. C. R. 458.

years from the date thereof, "yielding and paying therefor on every first day of October during the said term," it was proved that the first year's rent had been paid in advance. It was held, however, that the rent was not payable in advance under the terms of the lease, and that the term included the whole of the 1st October, 1862.

*Effect of indefinite habendum*:—In *Reeve v. Thompson* (f), the habendum of the lease, purporting to be made according to this Act, was, "during the term of occupancy as tenant of the lessee by said G. T. of premises on K. street, belonging to the said lessee. The said term to be computed from the first day of July, A.D. 1880, and from thenceforth next ensuing, and fully to be completed and ended as soon as the said G. T. shall vacate the said premises or cease to reside thereon." It was held that this lease did not operate as a lease for years, owing to the uncertainty of the termination thereof, but would be a tenancy at will until payment of rent, when it would be a tenancy from year to year.

## SCHEDULE B.

(Section 1).

### DIRECTIONS AS TO THE FORM OF THIS SCHEDULE.

1. Parties who use any of the forms in the first column of this Schedule, may substitute for the words "Lessee" or "Lessor" any name or names (or other designation) and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

"Any name or names":—e.g. "*party of the first part*" (g).

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular in the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

(f) 14 O. R. 499 (1887), *Rose, J.*

(g) *Per Patterson, J.A., in Emmett v. Quinn*, 7 A. R. 328 (1882).

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3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, the covenants and proviso shall be taken to be made with, and apply to the lessor, his executors, administrators and assigns.

5. Unless the contrary is expressly stated in the lease in all leases made after the 25th day of March, 1886, the extended form of covenant numbered 7 shall be read as containing after the word "lessee" in the first line thereof the words "his executors, administrators and assigns."

This fifth direction appears to have been inserted in view of the decision in *Crawford v. Bugg* (h), in which after considering the cases on the subject (i), the judge came to the conclusion that a covenant not to assign or sub-let without leave did not run with the land *except where the assigns were expressly named*.

*Extent of assignee's liability*:—"Now it has been expressly held that an action of covenant will not lie against an assignee of a lessee for breaches of covenant happening after he has ceased to be such assignee; and that with the object of escaping future liability he may even assign to a mere pauper: *Taylor v. Shum*, 1 B. & P. 21; *O'dell v. Wake*, 3 Camp. 394; *Onslow v. Corrie*, 2 Madd. 330; *Paul v. Nurse*, 2 M. & R. 525. But he continues liable for breaches of covenant committed while he was such assignee: *Harley v. King*, 2 C. M. & R. 18" (j).

"In the same way the assignee of the reversion can only maintain an action for breaches of covenant committed

(h) 12 O. R. 8, Mar. 16th, (1886).

(i) *Lee v. Lorsch*, 37 U. C. R. 262 (1875); *Williams v. Earle*, L. R. 3 Q.B. 739 (1868); *Webb v. Dobb*, L. R. 4 Q. B. 634 (1869); *Emmett v. Quinn*, 7 A. R. 306 (1882); *Toronto Hospital Trustees v. Denham*, 31 U. C. C. P. 203 (1880). See s. 4 *supra*.

(j) *Crawford v. Bugg*, 12 O. R. 13 (1886).

during his ownership; and, if the covenant be merely to perform a single act, which not being done is broken once for all before assignment made, an action will not lie at the suit of the assignee for such breach; but if the covenant be broken before the assignment, and there is a continuing breach after assignment, the assignee of the reversion is entitled to recover damages: *Johnson v. Churchwardens of St. Peter Hereford*, 4 A. & E. 520; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376; 32 Hen. VIII c. 34" (k).

## FORMS OF COVENANTS.

## COLUMN 1.

1. That the said (lessee) covenants with the said (lessor) to pay rent.

## COLUMN 2.

1. And the said lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said lessor that he, the said lessee, his executors, administrators and assigns, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

A covenant to pay rent runs with the land and binds the assignee of the lessee of demised premises though not named (l).

For method of reckoning rent in a mining lease see *Palmer v. Wallbridge* (m).

As to right of executor to sue for rents owing to testator see *Thatcher v. Bowman* (n).

## COLUMN 1.

2. And to pay taxes.

## COLUMN 2.

2. And also will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor on account thereof.

The covenant to pay taxes covers a special rate created by a corporation by-law as well as all other taxes (o).

(k) *Ib.* at p. 14.

(l) *Crawford v. Bugg*, 12 O. R. 12 (1886), citing *Spencer's case*, 5 Rep. 16; 3 Co. R. 29.

(m) 15 S. C. R. 650 (1888); 14 A. R. 460.

(n) 18 O. R. 265.

(o) *Re Michie & City of Toronto*, 11 U. C. C. P. 379 (1862); See *Aldwell v. Hannath*, 7 U. C. C. P. 9 (1867); *Boulton v. Blake*, 12 O. R. 532 (1886).

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(q) Grant See *McAnany* 465 (1859).

(r) 35 U.

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(u) 25 U.

(v) 28 U.

(w) 8 O. R.

(x) 16 A. R. followed *Coffin*

(y) 9 O. R.

(z) See cov.

(a) *Crawford v. Windsor's case* Mod. 371; Ma

While it seems that where the lease is silent as to the taxes, the landlord should pay them (*p*), yet if a tenant who covenants to pay the rent without deduction does pay the taxes, he cannot claim a deduction (*q*).

For how far this covenant extends to arrears see *McNaughton v. Wigg* (*r*); *Heyden v. Castle* (*s*).

For further cases see *McCarrall v. Watkins* (*t*); *Taylor v. Jarmin* (*u*); *Seragg v. City of London* (*v*); *Buckley v. Beigle* (*w*); *Finch v. Gilray* (*x*); *Carson v. Veitch* (*y*).

## COLUMN 1.

3. And to repair.

## COLUMN 2.

3. And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made, when, where, and so often as need shall be.

Covenants to repair or leave in a state of repair (*z*) run with the land and bind the assignee of the lessee of demised premises, though not named (*a*).

*Scope of the covenant to repair*:—"To repair is not the same as to put in repair, which may require the building of something new. The ordinary repairing covenant is

(*p*) *Dove v. Dove*, 18 U. C. C. P. 424 (1868).

(*q*) *Grantham v. Elliott*, 6 O. S. 192 (1842); *Wade v. Thompson*, 8 L. J. 22. See *McAnany v. Tickell*, 23 U. C. R. 499 (1864); *Bickle v. Beatty*, 17 U. C. R. 465 (1859).

(*r*) 35 U. C. R. 111 (1874).

(*s*) 15 O. R. 257 (1888).

(*t*) 19 U. C. R. 248 (1860), assessment as occupier.

(*u*) 25 U. C. R. 86 (1865), time within which taxes payable.

(*v*) 28 U. C. R. 457 (1869), liability of lessee of municipality.

(*w*) 8 O. R. 85 (1885), payment before statement of claim.

(*x*) 16 A. R. 484 (1889), payment of taxes does not take out of Stat. of Lim.; followed *Coffin v. N. A. Land Co.*, 21 O. R. 80 (1891).

(*y*) 9 O. R. 706 (1885), deduction of taxes from rent.

(*z*) See cov. No. 8 below.

(*a*) *Crawford v. Bugg*, 12 O. R. 12 (1886), citing *Dean & Chapter of Windsor's case*, 5 Rep. 24; *Blake's case*, 6 Rep. 43; *Keeling v. Morrice*, 12 Mod. 371; *Matures v. Westwood*, Cro Eliz. 599, 617.

merely to maintain things *in use in the state they were in when the premises were demised*" (b).

Woodfall says (c):—"Where a lessee covenants to keep *old* premises in repair, he is not liable for such dilapidations as result from the natural operations of time and the elements (d); and with a view to determine the relative sufficiency of repair, the jury may consider whether the house was new or old at the time of the demise (e); and what was its *then* state of repair and condition *generally* (f), not in detail (g).

"Tenantable repairs of buildings in a general covenant for that purpose are intermediate between substantial repairs, which consist of bricklayers' and carpenters' work, and ornamental repairs, which consist of papering, painting, and white-washing: Wood on Dilapidations, p. 8. The tenant is bound to preserve the fabric of the buildings from permanent decay, and for that purpose is obliged to repair the external covering of the house, whether slated, tiled, or thatched, and he must repair the place and restore broken windows, and mend chimneys when injured. So any damage done to the woodwork of the building through want of ordinary care, and not caused merely by time and use, must be restored. Such as permitting the racks of a stable to become decayed. *Anon*, 2 Vent. 214.

"The tenant is only bound to maintain an old building in suitable repair. It is not meant that an old building is to be restored in a new form at the end of the term or of greater value than at the commencement; but the tenant

(b) *Martyn v. Clue*, 18 Q. B. 674 (1852).

(c) *L. & T.* 13th Ed. 589.

(d) Citing *Entteridge v. Munyard*, 1 Moo. & R. 334.

(e) Citing *Stanley v. Towgood*, 3 Bing N. C. 4.

(f) Citing *Burdett v. Withers*, 7 A. & E. 136.

(g) Citing *Mantz v. Goring*, 4 Bing N. C. 451; *Yonge v. Mantz*, 6 Scott 277; *Belcher v. McIntosh*, 8 C. & P. 720; 2 Moo. & R. 186; *Woolcock v. Dew*, 1 F. & F. 337.

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is to take care that the premises do not suffer more than the operation of time and nature would affect. He is bound, I take it, by reasonable application and labour to keep the premises as nearly as possible in the same condition as when they were demised: *Entteridge v. Munyard*, 1 Moo. & R. 334; *Belcher v. McIntosh*, 8 C. P. 720."

## COLUMN 1.

4. And to keep up fences.

## COLUMN 2.

4. And also will, from time to time, during the said term keep up the fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new-made in a good and husband-like manner and at proper seasons of the year.

Where an enterprising conveyancer ran together this covenant and the preceding one into one covenant "to repair and keep up fences," he lost the benefit of the extended form in column 2, and drew forth from Patterson. J.A., a somewhat uncomplimentary analysis of the supposed meaning of his conveyance (*h*). In all probability the conveyancer was merely the victim of one of the ordinary printed forms of lease, which sometimes contain what are verbally very slight, but legally very important, variations from the words prescribed by the present Act.

For further cases see *Cook v. Edwards* (*i*), *Houston v. McLaren* (*j*).

*Removal of fence, how far a breach of covenant*:—"I am not prepared to hold that the removal of a fence from one place to another, in this country, *per se* is a breach of a covenant to repair and keep fences in repair, as matter of law. Much must depend upon the nature of the fence and the use to which it has been put. It would be absurd to say that the removal of a fence put around a hay or straw stack to keep cattle off, because it happened to be in that

(*h*) *Emmett v. Quinn*, 7 A. R. 322 (1882).

(*i*) 10 O. R. 341, erection of new fences.

(*j*) 14 A. R. 103, covenant as to building of line fence.

position at the time of the demise, would be a breach of the covenant to repair and keep in repair. It would be equally absurd to say that a fence run across the cattle yard temporarily to keep certain animals separate, because it was in that position at the time of the demise, could not be moved without committing a breach of the covenant (k).

## COLUMN 1.

5. And not to cut down timber.

6. And that the said (*lessor*) may enter and view state of repair, and that the said (*lessee*) will repair according to notice.

## COLUMN 2.

5. And also will not at any time during the said term hew, fell, cut down or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance as herein set forth.

6. And it is hereby agreed that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premises to examine the condition thereof; and further, that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly.

The covenant to repair according to notice is qualified by any exceptions that may be made in the covenant to repair, even although the same exceptions are not expressly made in the covenant to repair according to notice (l).

*Where landlord covenants to repair:*—"As between landlord and tenant the former is not liable to repair during the term in the absence of contract. Therefore the tenant's remedy rests not upon the negligence of the owner, but upon the contract to repair. In the case of slight repairs the tenant is justified after notice of want of repair, and a reasonable time elapses, to expend what is needed in

(k) *Cameron, J.*, in *Leighton v. Medley*, 1 O. R. 217 (1882); the learned Chief Justice held that as rent had been accepted after the removal of the fence, such acceptance was a waiver of the forfeiture if any. Cf. *Holdness v. Lang*, 11 O. R. 1 (1886), waiver; breach of wall to make door is breach of covenant; erection and repair of fixtures.

(l) *Thistle v. Union Forwarding & R. W. Co.*, 20 C. P. 76 (1878).

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making the repairs and charging it against his landlord, or taking it out of the rent" (m).

COLUMN 1.

7. And will not assign or sub-let without leave.

COLUMN 2.

7. And also that the lessee shall not, nor will during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over or sub-let unto any person or persons whomsoever without the consent in writing of the lessor his heirs or assigns first had and obtained.

*Verbal assent of lessor no protection to lessee:*—In *Carter v. Hibblethwaite* (n), a case under this section, it was held that a subsequent oral acquiescence is not sufficient to bind the lessor, as having waived the forfeiture.

*Is notice to quit or demand for possession necessary in case of breach?*—"I find no authority requiring either a notice to quit or a demand of possession previous to bringing ejectment for a forfeiture, when the lease contains a power of re-entry for non-performance of a covenant to repair, or for underletting without consent, contrary to the terms of the lease" (o).

*Assignment for benefit of creditors:*—For the effect of an assignment in insolvency on the right of distress, see *Graham v. Long* (p), *Baker v. Atkinson* (q), *Linton v. Imperial Hotel* (r).

For further cases see *Leys v. Fiskin* (s), *Magee v. Rankin* (t), *Bacon v. Campbell* (u), *McArthur v. Alison* (v).

(m) *Boyd, C.*, in *Brown v. Toronto General Hospital*, 23 O. R. 603 (1893), citing *Beale & Taylor's case*, 1 *Leonard's Rep.* 237; *Weigall v. Waters*, 6 T. R. 488; *Makin v. Watkinson*, L. R. 6 Ex. 29; *Huggall v. McKean*, 1 Ca. & Ell. p. 394.

(n) 5 C. P. 475 (1856).

(o) *Connell v. Powell*, 13 C. P. 91; see *Ib.* for what is sufficient evidence of underletting.

(p) 10 O. R. 248.

(q) 11 O. R. 735.

(r) 16 A. R. 337.

(s) 12 U. C. R. 604, where sub-tenant agreed to go out when required.

(t) 29 U. C. R. 257 assignment for benefit of creditors.

(u) 40 U. C. R. 517, assignment by way of mortgage.

(v) 40 U. C. R. 570, action of trespass by under-tenant (without leave).



## COLUMN 1.

8. And that he will leave the premises in good repair.

9. Proviso for re-entry by the said (lessor) on non-payment of rent or non-performance of covenants.

## COLUMN 2.

8. And further the lessee will, at the expiration, or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures thereon in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted.

9. Provided always and it is hereby expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained on the part of the lessee, his executors, administrators or assigns, then and in either of such cases it shall be lawful for the lessor at any time hereafter, into and upon the said demised premises or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess and enjoy, as of his or their former estate; anything hereinafter contained to the contrary notwithstanding.

*Variations of the proviso for re-entry:—In Crozier v. Tabb (w), the proviso for re-entry appeared in the following form: "Proviso for re-entry by the said lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants, or seizure, or forfeiture of the said term for any of the causes aforesaid." It was held that the statute was applicable and further that the proviso extended to covenants after as well as before it in the lease.*

*"It shall be lawful to re-enter":—Doe Kings College v. Kennedy (x) when the proviso stated that "it should be lawful for the landlord to re-enter, Robinson, C.J., held that the effect of the non-payment of rent upon such a demise would be to make it not void ipso facto but only void upon proper proceedings being taken for that purpose; and consequently that until such proceedings were taken the term would subsist in the tenant.*

(w) 38 U. C. R. 54 (1876), Harrison, C.J.

(x) 5 U. C. R. 577 (1849); Cf. Doe d. Cubitt v. McLeod, Rob. & Jos. 2035; McDonald v. McDonald, 17 U. C. R. 270; Dallye v. Robertson, 19 U. C. R. 411 (1860), sale by sheriff after forfeiture; O'Nare v. McCormack, 30 U. C. R. 567.

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*Proviso absolutely determining lease*:—A proviso is sometimes added in leases making the lease void upon non-payment or non-performance of covenant. *Faugher v. Burley* (y), contains some useful observations on the subject of such a proviso. In this case the proviso was at the end of the lease in these words: "This lease will be void if the lessee fail to perform this agreement." Morrison, J., after assuming that the words "this agreement" were meant to apply to the covenant to pay rent, which was not very clear, went on to say: "The construction of such a proviso or agreement is, that the lease shall be voidable only at the option of the lessor (z).

"It is also, I think, settled law that in order to take advantage of such a proviso, and to entitle the lessor absolutely to determine the lease for non-payment of the rent, a formal and legal demand of the rent is necessary."

*Fifteen days*:—In *Campbell v. Baxter* (a), notice had been given terminating the lease on March 20th, 1863, the half year's rent became due March 15th, and the lessor claimed that the lease was determined under the proviso for re-entry. The Court, however, considered that as the forfeiture under that proviso would not have been complete until March 30th, while the term was at an end on March 20th, there was therefore nothing to forfeit.

*Waiver of right of entry*:—"Mere knowledge or acquiescence in an act constituting a forfeiture does not amount to waiver. There must be some expenditure of money in improvements or some positive act of waiver (b), such as

(y) 37 U. C. R. 498 (1875); Cf. *McLellan v. Rogers*, 12 U. C. R. 571.

(z) Citing *Doe d. Bryan v. Banks*, 4 B. & Ald. 401; *Arnsby v. Woodward*, 6 B. & C. 519; *Doe d. Nash v. Birch*, 1 M. & W. 402.

(a) 15 C. P. 42 (1864).

(b) *e.g.*, a submission to arbitration: *Black v. Allan*, 17 C. P. 240; extension of time: *Flower v. Duncan*, 13 Gr. 242.

receipt of rent" (c). But receipt of rent that had accrued before the forfeiture is not a waiver (d); and it seems that where the lessor has re-entered for a forfeiture, receipt of rent will not prejudice as there can be no waiver after an entry (e).

For further cases as to forfeiture and re-entry, see *Hyndman v. Williams* (f); *Sheldon v. Sheldon* (g); *Taylor v. Jermyn* (h); *Heley v. The Canada Co.* (i); *McLaren v. Kerr* (j).

## COLUMN 1.

10. The said (lessor) covenants with the said (lessee) for quiet enjoyment.

## COLUMN 2.

10. And the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them. R. S. O. 1877, c. 103, Sched. B.; 49 V. c. 21, s. 2.

"*Claiming by, from or under*":—In *Bellamy v. Barnes* (k), the lessee being evicted by the assignee of mortgages created prior to the lease, brought an action for breach of the covenant for quiet enjoyment. It was held that he could not recover as the assignee of the mortgages was a

(c) *Harrison, C.J.*, in *McLaren v. Kerr*, 39 U. C. R. 507 (1876); as to receipt of rent, see *Roe v. Southard*, 10 C. P. 488; *McDonald v. Peck*, 17 U. C. R. 270; *Bleecker v. Campbell*, 4 L. J., 136; *Roaf v. Garden*, 23 C. P. 59; *Manning v. Dever*, 35 U. C. R. 294; *Leighton v. Medley*, 1 O. R. 207. As to delay in proceedings see *Kerr v. Hastings*, 25 C. P. 429. As to continuing breaches see *Ainsley v. Balsden*, 14 U. C. R. 535; *Holderness v. Lang*, 11 O. R. 1.

(d) *Dobson v. Sootheran*, 15 O. R. 15 (1887).

(e) *Thompson v. Baskerville*, 40 U. C. R. 614 (1877).

(f) 8 C. P. 293, no reservation of right of re-entry to a stranger to legal estate.

(g) 22 U. C. R. 621, right of re-entry not affected by penalty attached to breach of covenant.

(h) 25 U. C. R. 86, non-payment of taxes as a cause of forfeiture.

(i) 23 C. P. 20, 597, effect of proviso for determining lease by notice, on right of re-entry.

(j) 39 U. C. R. 507, ambiguous covenant.

(k) 44 U. C. R. 315 (1879).

person not "claiming by, from or under" the lessor, but claiming under the lessor's predecessor in title; and that it made no difference that the lessor had assumed the mortgages.

*Effect of postponing lease to Mortgage*:—By an agreement postponing a lease to a mortgage the lessee will be placed in no worse position than if the mortgage had been made prior thereto, so that the lessee merely holds subject to the mortgage, and subsequent mortgagees hold subject to the lease; while the covenant for quiet enjoyment would in that case hold good, and any breach of it entitle the lessee to damages (*l*).

For further cases under covenant for quiet enjoyment, see *Snarr v. Baldwin* (*m*); *Reynolds v. City of Toronto* (*n*); *Clarke v. G. T. R.* (*o*); *Purser v. Bradburn* (*p*); *MacLennan v. Royal Ins. Co.* (*q*); *Davis v. Pitchers* (*r*); *Thompson v. Crawford* (*s*).

(*l*) *Anderson v. Stevenson*, 15 O. R. 563 (1888).

(*m*) 11 C. P. 353 (1862), enjoyment interfered with by Act of Legislature.

(*n*) 15 C. P. 276 (1865), by-law of lessors as a breach of covenant.

(*o*) 35 U. C. B. 57 (1874), expropriation by Railway.

(*p*) 25 C. P. 108 (1875), proviso for re-entry should be stated.

(*q*) 37 U. C. R. 284 (1875), lease of flat with passages, etc.

(*r*) 24 C. P. 516 (1875), eviction by title paramount to lessor.

(*s*) 13 C. P. 53 (1863), covenant independent of lease for years.

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## R. S. O. 1887, CHAPTER 107.

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## R. S. O. 1887, CHAPTER 107.

### An Act respecting Short Forms of Mortgages.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows;—

1. Where the words following occur in this Act or in the Schedules thereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :

Interpretation.

(1) "Lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, or any undivided part or share therein respectively ;

"Lands."

(2) "Party" shall mean and include any body politic or corporate as well as an individual. R. S. O. 1877, c. 104, s. 1.

"Party."

2. Where a mortgage of real property in Ontario, made according to the form set forth in Schedule A, annexed to this Act, or any other such mortgage expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in column one of Schedule B, to this Act, and distinguished by any number therein, such mortgage shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of said Schedule B, and distinguished by the same number as is annexed to the form of words used in such mortgage ; but it shall not be necessary in any such mortgage to insert any such number. R. S. O. 1877, c. 104, s. 2.

Where words of column one of Schedule B, are employed, the mortgage to have the same effect as if the words in column two were inserted.

3. Any such mortgage or part of such mortgage which fails to take effect by virtue of this Act, shall nevertheless be as effectual to bind the parties thereto, as if this Act had not been made. R. S. O. 1877, c. 104, s. 3.

Mortgages not taking effect under this Act how far valid.

4. Every such mortgage, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, under-woods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands therein comprised belonging, or in any wise appertaining, or with the same demised,

Mortgage to include all houses, etc., and the reversion and all the estate, etc., of the grantor.

held, used, occupied and enjoyed, or taken or known as part or parcel thereof, and if the same purports to convey an estate in fee, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor in, to, out of or upon the same lands and every part and parcel thereof; with their and every of their appurtenances, subject always to the reservations, limitations, provisoes and conditions contained in the grant of such lands from the Crown. R. S. O. 1877, c. 104, s. 4.

Compare the notes to the corresponding sections in Chapter 105.

Schedules, etc., to form part of Act. 5. The schedules hereto, and the directions and forms therein contained, shall be deemed parts of this Act. R. S. O. 1877, c. 104, s. 6.

## SCHEDULE A.

(Section 2.)

### FORM OF MORTGAGE.

This Indenture, made the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_, in pursuance of The Act respecting Short Forms of Mortgages, between *(here insert the names of parties and recitals, if any)* witnesseth, that in consideration of \_\_\_\_\_ of lawful money of Canada, now paid by the said mortgagee *(or mortgagees)* to the said mortgagor *(or mortgagors)*, the receipt whereof is hereby acknowledged, the said mortgagor *(or mortgagors)* doth *(or do)* grant and mortgage unto the said mortgagee *(or mortgagees)*, his *(her or their)* heirs, executors, administrators and assigns forever, all *(parcels)*.

*(Here insert provisoes, covenants or other provisions).*

In witness whereof the said parties hereto have hereunto set their hands and seals.

[R. S. O. 1877, c. 104, Schedule A.]

## SCHEDULE B.

(Section 2.)

### DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE.

1. Parties who use any of the forms in the first column of this Schedule may substitute for the words "mortgagor" or "mortgagors," or "mortgagee"

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or "mortgagees," any name or names; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this Schedule; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into, or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

Cf. the notes to Chapter 106, direction 1. See also under clause 14, *infra*.

#### FORMS OF COVENANTS, ETC.

##### COLUMN 1.

1. And the said (A. B.) wife of the said mortgagor hereby bars her dower in the said lands.

##### COLUMN 2.

1. And the said (A. B.) wife of the said mortgagor, for and in consideration of the sum of of lawful money of Canada, to her in hand paid by the said mortgagee, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said mortgagee, his heirs, executors, administrators and assigns, all her dower, and right and title which, in the event of her surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.

This clause is open to the same objection as the bar of dower in Chapter 105.

*Effect of wife's bar of dower in mortgage:*—The wife of a mortgagor, who has joined in the mortgage for the purpose of barring her dower, to the extent of the mortgage only, has the right to redeem during her husband's lifetime, and is a necessary party to an action of foreclosure in the first instance. And where she was not so made a party, and judgment of foreclosure was recovered in her absence, she was, after judgment and report, added as a defendant upon her own petition, and permitted to redeem or pay off and obtain an assignment of the mortgage (a).

(a) *Blong v. Fitzgerald*, 15 P. R. 467 (Dec. 1893), *Rose, J.*; *Pratt v. Bunnell*, 21 O. R. 1, considered; this latter is an exceedingly important case on the subject of dower in mortgaged property, and collects the cases *pro* and *con*.

## COLUMN 1.

2. Provided: This mortgage to be void on payment of (amount of principal money) of lawful money of Canada, with interest at (rate of interest) per cent. as follows: (terms of payment of principal and interest) and taxes and performance of statute labour.

## COLUMN 2.

2. Provided always, and these presents are upon this express condition, that if the said mortgagor, his heirs, executors, administrators or assigns, or any of them, do and shall well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the just and full sum of (amount of principal money) of lawful money of Canada, with interest thereon, at the rate of (rate of interest) per cent. per annum, on the days and times, and in manner following: that is to say (terms of payment of principal and interest), without any deduction, defalcation or abatement out of the same for or in respect of any taxes, rates, levies, charges, rents, assessments, statute labour or other impositions whatsoever already rated, charged, assessed or imposed, or hereafter to be rated, charged, assessed or imposed by authority of Parliament or of the Legislature, or otherwise howsoever, on the said lands and tenements, hereditaments and premises, with the appurtenances, or on the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said premises, or of the said money or interest, or any other matter or thing relating to these presents, and until such default as aforesaid shall and will well and truly pay, do and perform or cause to be paid, done and performed, all matters and things in this proviso hereinbefore set forth, then these presents and everything in the same contained shall be absolutely null and void.

*Construction of proviso for redemption:*—In *Coleman v. Hill (b)*, the facts were these:—W. H. conveyed his farm to his son and took back from him a mortgage on it, with a proviso for redemption on payment of \$4,000, without interest, in manner following: to pay W. H. and A. H. his wife, during their joint lives, \$300 a year, and to continue to make the said payments to the survivor during his or her life; and one year after the death of both to pay his brothers and sisters \$300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being in print. The question arose, was the son entitled to a discharge on payment of the net sum of \$4,000. Boyd, C.—It is impossible to give literal effect to all the parts of the mortgage in question. The defeasance clause upon payment of \$4,000, without interest, is quite irreconcilable with the particulars regarding

(b) 10 O. R. 172 (1885).

## COLUMN 1.

3. The said mortgagor covenants with the said mortgagee,

4. That the mortgagor will pay the mortgage money and interest and observe the above proviso.

The changes in abolition Ontario L. do not seem to pass

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the payments which the mortgage is made to secure. . . . I infer that \$4,000 was mentioned as a good round sum to be expressed in the deed as the price of the land conveyed to the son; but it was in truth no more than the nominal consideration inserted for the sake of brevity, according to a not unusual practice among conveyancers when printed forms are used to keep down the expense. It is manifest that neither of the parties could have treated this as the real consideration, having regard to that written part of the mortgage which should, as a general rule, carry more weight than the printed part with the blanks formally filled up: *McKay v. Howard*, 6 O. R. 137."

## COLUMN 1.

3. The said mortgagor covenants with the said mortgagee.

4. That the mortgagor will pay the mortgage money and interest, and observe the above proviso.

## COLUMN 2.

3. And the said mortgagor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said mortgagee, his heirs, executors, administrators and assigns, in manner following, that is to say :

4. That the said mortgagor, his heirs, executors, administrators or some or one of them shall and will well and truly pay or cause to be paid unto the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, at the days and times and in the manner above limited for payment thereof, and shall and will in everything well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.

*The personal covenant to pay :—* Some proposed changes in mortgage law, chiefly with a view to the abolition of the above covenant, have been before the Ontario Legislature in its present session, 57 Viet., but do not seem to have been favorably received, and did not pass.

Formerly the breach of such a covenant created a debt good for twenty years; but by 56 V. c. 17, the period has been reduced to ten years.

The text of the last mentioned Act is as follows :

56 VIC. CAP. 17.

An Act to amend the Act respecting the Limitation of Certain Actions.

[Assented to 27th May, 1893.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Sub-section 1 of section 1 of chapter 60, of the Revised Statutes of Ontario, 1887, is amended by adding to clause (b) of said sub-section, in the fifth line of said sub-section, the words "except upon the covenants contained in an indenture of mortgage," and by adding at the end of the said sub-section the following clause, (h) "actions upon any covenant contained in any indenture of mortgage, made after the first day of July, 1894, within ten years after the cause of such actions arose."

2. This Act shall go into effect on the first day of July, 1894.

COLUMN 1.

5. That the mortgagor has a good title in fee simple to the said lands.

COLUMN 2.

5. And also, that the said mortgagor, at the time of the sealing and delivery hereof, is, and stands solely, rightfully and lawfully seised of a good, sure, perfect, absolute and indefensible estate of inheritance, in fee simple of, and in the lands, tenements, hereditaments and all and singular other the premises hereinbefore described, with their and every of their appurtenances, and of and in every part and parcel thereof, without any manner of trusts, reservations, limitations, provisoes or conditions, except those contained in the original grant thereof from the Crown or any other matter or thing to alter, charge, change, incumber or defeat the same.

Of the effect of such a covenant as the present one, No. 5, by way of estoppel, Strong, J., in *Trust and Loan Co. v. Rutten (c)*, says: "This mortgage deed of the 10th April, 1855, although it contains no recital, comprises the usual absolute mortgagor's covenants for title. Now, for upwards of forty years it has been held in Upper Canada that covenants for title, especially the usual covenant that the granting party is seised in fee at the date of the deed, a covenant which this deed contains in the absolute, not in

(c) 1 S. C. R. 584 (1877); followed in *Casselman v. Casselman*, 9 O. R. 448 (1885).

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the ordinary restricted form, are as effectual in working an estoppel as a recital to the same effect would have been. The cases to which I refer, and which are always referred to as the leading cases on this point, are three: *Doe Hanessey v. Meyers* (d), *Doe Irvine v. Webster* (e), *McLean v. Laidlaw* (f). Whether these decisions attributing to the covenants the same efficacy as positive certain recitals are right (g) it is now too late to inquire, as the principle has become a fixed rule of the law of property in the Province of Ontario, too well established therein to be shaken."

## COLUMN 1.

6. And that he has the right to convey the said lands to the said mortgagee.

7. And that on default the mortgagee shall have quiet possession of the said lands.

## COLUMN 2.

6. And also that the said mortgagor now hath in himself good right, full power and lawful and absolute authority to convey the said lands, tenements, hereditaments, and all and singular other the premises hereby conveyed or hereinbefore mentioned or intended so to be, with their and every of their appurtenances unto the said mortgagee, his heirs, executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents.

7. And also, that from and after default shall happen to be made of or in the payment of the said sum of money, in the said above proviso mentioned, or the interest thereof, or of any part thereof, or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso, particularly set forth, contrary to the true intent and meaning of these presents, and of the said proviso, then, and in every such case, it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess and enjoy the aforesaid lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, with their appurtenances, without the let, suit, hindrance, interruption or denial of him the said mortgagor, his heirs or assigns, or any other person or persons whomsoever.

(d) 2 O. S. 424 (1832).

(e) 2 U. C. R. 224 (1845).

(f) 2 U. C. R. 222 (1845).

(g) "The English cases show that a covenant is not sufficient to work an estoppel;" *per* Proudfoot, J., in *Casselman v. Casselman*, *supra*, citing *Heath v. Crealock*, L. R. 10 Ch. 22 (1874); *Crofts v. Middleton*, 2 K. & J. 194 (1856); *General Finance Co. v. Liberator*, 10 Ch. D. 15 (1878).

*Distinction between powers conferred by No. 7 and No. 14*:—A comparison of the effect of the present proviso and of proviso No. 14, *infra*, is admirably set forth in the following extract from the recent decision in *Brethour v. Brooke* (*h*):—"When the mortgagee took possession the interest was in arrear, and the estate of the mortgagor was in law, at an end. His right to possession then ceased, as the contract between the parties provided. For the mortgage under the Short Forms Act, also contained the covenant (No. 7, p. 968) that in default the mortgagee shall have quiet possession. That is not repugnant to the latter clause No. 14, as to notice required before the mortgagee can enter on and lease or sell. The action intended in the latter clause is not the mere taking possession under the security for the purpose of keeping down the interest, but the entering on the land to lease or sell in such wise, that the right of redemption shall be postponed or destroyed. The effect of the earlier provision as to default in giving the right to enter without notice, or to take possession if it can be peaceably obtained, is seen in such cases as *Doe d. Garrod v. Olley*, 12 A. & E. 481, and *Lowe v. Telford*, 1 App. Cas. 411.

"Being then, upon and after the default, entitled to possession, it was, in my opinion, competent for the mortgagee to rent the land so as not to interfere with the right of the mortgagor or the plaintiff to redeem. If the security was scanty as I find, and the interest was in arrear, then it was competent for the mortgagee to make the best provision he could for his own safety; even to the cutting down of trees; and if so, he could confer that power upon others under him subject always to the right of the owner of the equity of redemption to call both to an account at the proper time.

(*h*) 23 O. R. 361 (1893). *Boyd, C.*

"The power of leasing also exists when the mortgagee takes possession, though his lease may not bind the owner of the equity of redemption. A lease so made, in case of sufficient security, if not made pursuant to the 14th proviso, would be subject to the right of the mortgagor to pay up arrears of interest and resume possession. But that manner of relief is not asked, nor would it serve the purpose of the plaintiff in this case; but were it the precise point of contention, I should question the right of the mortgagor to obtain it in the case of a security, when the mortgagee has been compelled to protect himself by making the most provident lease possible."

## COLUMN 1.

8. Free from all incumbrances.

## COLUMN 2.

8. And that free and clear and freely and clearly acquitted, exonerated and discharged of and from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands, tenements, hereditaments and premises or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, judgments, executions and recognizances, and of and from all manner of other charges or incumbrances whatsoever.

The covenants for title in a mortgage differ from those in a deed of grant in being absolute covenants, not restricted to the acts of the covenantor. With this difference, the notes appended to the corresponding covenants in cap. 105, *supra*, may be read as applying to the covenants for title in the present chapter.

## COLUMN 1.

9. And that the said mortgagor will execute such further assurances of the said lands as may be requisite.

## COLUMN 2.

9. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said proviso mentioned, or the interest thereof, or any part of such money or interest, or of, or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then and in every such case, the said mortgagor, his heirs and assigns, and all and every other person or persons whatsoever having, or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest or



## COLUMN 1.

10. And also that the said mortgagor will produce the title deeds enumerated hereunder, and allow copies to be made at the expense of the mortgagee.

11. And that the said mortgagor has done no act to incumber the said lands.

## COLUMN 2.

trust of, in, to, or out of the lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with the appurtenances or any part thereof, by, from, under or in trust for him the said mortgagor, shall and will, from time to time, and at all times thereafter, at the proper costs and charges of the said mortgagee, his heirs, executors, administrators and assigns, make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances and assurances, in the law for the further, better and more perfectly and absolutely conveying and assuring the said lands, tenements, hereditaments and premises, with the appurtenances, unto the said mortgagee, his heirs, executors, administrators and assigns, as by the said mortgagee his heirs and assigns, or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or required, so as no person who shall be required to make or execute such assurances shall be compelled, for the making or executing thereof, to go or travel from his usual place of abode.

10. And also, that the said mortgagor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request and proper costs and charges in the law of the said mortgagee, his heirs, executors, administrators or assigns, at any trial or hearing in any action, or otherwise as occasion shall require, produce all, every or any deed, instrument or writing hereunder written for the manifestation, defence and support of the estate, title and possession of the said mortgagee, his heirs, executors, administrators and assigns, of, in, to or out of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, and at the like request costs and charges shall and will make and deliver, or cause or procure to be made and delivered, unto the said mortgagee, his heirs, executors, administrators and assigns, true and attested or other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said mortgagee, his heirs and assigns.

11. And also that the said mortgagor hath not at any time heretofore made, done, committed, executed or wilfully or knowingly suffered any act, deed, matter or thing whatsoever whereby or by means whereof the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, or any part or parcel thereof, are, is or shall or may be in any wise impeached, charged, affected or incumbered in title, estate or otherwise howsoever.

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## COLUMN 1.

12. And that the said mortgagor will insure the buildings on the said lands to the amount of not less than currency.

## COLUMN 2.

12. And also that the said mortgagor or his heirs shall and will forthwith insure, unless already insured, and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of \_\_\_\_\_ of lawful money of Canada, at the least, in some insurance office, to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns, the policy or policies of assurance, receipt or receipts ~~thereto~~ appertaining; and if the said mortgagee, his heirs, executors, administrators, or assigns, shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments, and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

The most common form of mortgagee insurance in Canada is to take out a policy in the name of the mortgagor, and to append to it a slip such as the following:—

“At the request of the assured, the loss, if any, under this policy is hereby made payable to (*name of mortgagee*) as (*his, etc.*) interest may appear.”

*Mortgage clause in policies:—*It is usual, however, to insert a mortgage clause to which the respective rights of the mortgagee and the insurer are made subject by adding the words, “subject to the conditions of the above mortgage clause.”

“This clause is a special stipulation, operative only between the insurance company and savings banks, or other money loaning institutions or individuals to which it may be conceded, usually accompanying a mortgagor’s policy when loss thereunder is made payable to such

parties as mortgagees, and intended as a protection against any acts or omissions on the part of the insured, the mortgagor, by which the insurance might become invalid to such mortgagee; in which event the policy would continue to cover the interests of such mortgagees, though the insured may have set fire to the premises, or otherwise wilfully caused loss. Thus, as the mortgagor has no interest in the clause—it not becoming operative until his legal interest in the insurance shall have entirely ceased—it is difficult to conceive why it should, as in present practice, form one of the stipulations attached to *his* policy, which was not the custom in the early days of the use of this clause, which then, very probably, was considered and treated as a separate transaction altogether.

"The first use of this clause was by the Mutual Life Insurance Company of New York, early in 1860. It was very exacting upon the companies, entirely nullifying many of the most saving stipulations of the policy as issued to owners directly. This form soon became common among other loaning institutions, and for many years subsequent this clause was a source of much vexation and annoyance to the companies and the courts as well, until some of the more prominent offices refused to write them. From time to time, however, improvements were introduced into the clause such as the right of cancellation by the company theretofore denied, contribution, etc., under which the fact that the companies had some rights that these grasping mortgagees should respect was recognized" (i).

The form of "mortgage clause" adopted by the Underwriters' Association of Canada is the following:—

*"It is hereby provided and agreed, that the insurance, as to interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor."*

(i) Griswold: Fire Underwriters' Text Book, 2nd ed. 394.

owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

*"It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge, and that every increase of hazard, not permitted, by the mortgagor or owner, shall be paid for by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates for the use of such increased hazard during the continuance of this insurance.*

*"It is also further provided and agreed, that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall be at once legally subrogated to all right of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage (j), and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.*

*"It also further provided and agreed, that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagee, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained."*

Where the policy said "loss if any payable to M. as his interest may appear." Wilson, C.J., said "The *interest* of

(j) And are not bound to reduce the security by the amount paid: *West v. Hanley*, 22 Gr. 382 (1875).

the plaintiff, referred to in the policy, is his interest as mortgagee, for although the fact of his being mortgagee is not stated, it may be averred under the term, 'as his interest may appear' " (k).

*Effect of covenant without formal assignment of policy:*

—A covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insurance when effected. Therefore where a mortgagor enters into such a covenant it is not necessary, in the interest of the mortgagee, that an assignment of the policy or interim receipt should be actually made; it is sufficient if the insurers in case of loss have notice of the fact before settling with the mortgagor, and if after being notified of the rights of the mortgagee they pay over the insurance money to the mortgagor or a transferee of the policy or receipt, they do so at their peril; and such payment will be no answer to a suit at the instance of the mortgagee (l).

"And if the said mortgage . . . shall pay any premiums":—If the mortgagee charges the mortgagor with the premiums and undertakes to procure the insurance he is, in case through his neglect to pay the premiums the policies lapse, liable to the extent the insurance company would have been, had the policies been continued by the payment of the premiums (m).

*Right of subrogation:*—Where the mortgagee insures the property in his own name it seems that the company has no right to call upon him after payment of the policy to assign his mortgage to them (n). But where the mortgagor insures and the policy is assigned to the mortgagee the company is entitled to an assignment (o).

(k) *Mitchell v. City of London Fire Insurance Co.*, 12 O. R. 723 (1886).

(l) *Greet v. Citizens Insurance Co.*, 27 Gr. 121 (1879).

(m) *Soule v. Union Bank*, 45 Barb. (N.Y.) 111; S. C. 30 How. Pr. 105.

(n) *Provincial Insurance Co. v. Reesor*, 21 Gr. 296 (1874); 33 U. C. R. 357.

(o) *Burton v. Gore District Mutual Fire Insurance Co.*, 12 Gr. 156 affirmed on appeal, (1875).

13. And said mortgagor do release to the said mortgagee all his claim upon the said land subject to the said proviso.

14. Provided, that the said mortgagee on default of payment for . . . months, may on . . . notice enter on and lease or sell the said lands.

## COLUMN 1.

13. And the said mortgagor doth release to the said mortgagee all his claims upon the said lands subject to the said proviso.

## COLUMN 2.

13. And the said mortgagor hath released, remised and for ever quitted claim, and by these presents doth release, remise, and for ever quit claim unto the said mortgagee, his heirs, executors, administrators and assigns, all and all manner of right, title, interest, claim and demand whatsoever, of, unto and out of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, and every part and parcel thereof, so as that neither the said mortgagor, his heirs, executors, administrators or assigns, shall or may at any time hereafter have, claim, pretend to, challenge or demand the said lands, tenements, hereditaments and premises, or any part thereof, in any manner howsoever, subject always to the said above proviso; but the said mortgagee, his heirs, executors, administrators or assigns, and the said lands, tenements, hereditaments and premises, subject as aforesaid, shall from henceforth for ever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said mortgagor, his heirs or assigns, might or could have upon the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said lands, tenements, hereditaments and premises, or upon the said lands, tenements, hereditaments and premises.

14. Provided, that the said mortgagee on default of payment for months, may on notice enter on and lease or sell the said lands.

14. Provided always, and it is hereby declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in any payment of the said money or interest or any part of either of the same, according to the true intent and meaning of these presents, and of the proviso in that behalf hereinbefore contained, and calendar months shall have thereafter elapsed without such payment being made (of which default, as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall be conclusive evidence), it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators or assigns, after giving written notice to the said mortgagor, his heirs or assigns, of his intention in that behalf, either personally or at his or their usual or last place of residence within this Province not less than previous, without any further consent or concurrence of the said mortgagor, his heirs, or assigns, to enter into possession of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in or out of possession of the same, to make any lease or leases thereof, or of any part thereof as he shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, or any part or parts thereof, with the appurtenances, by public auction or private contract, or partly by

public auction and partly by private contract, as to him shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and assigns, or as he, she or they shall direct and appoint, and to execute and do all such assurances, acts, matters and things as may be found necessary for the purposes aforesaid, and the said mortgagee shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid unless the same shall happen by reason of his wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators or assigns shall and will stand and be possessed of and interested in the rents and profits of the said lands, tenements, hereditaments and premises, in case he shall take possession of the same on any default as aforesaid, and after such sale or sales shall stand and be possessed of and interested in the money to arise and be produced by such sale or sales, or which shall be received by the mortgagee, his heirs, executors, administrators or assigns, by reason of any insurance upon the said premises or any part thereof, upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases and conveyances as aforesaid, and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns, shall bear, sustain or be put to for taxes, rent, insurances and repairs, and all other costs and charges which may be incurred in and about the execution of any of the trusts in him hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned, or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his executors, administrators or assigns, or as he shall direct and appoint, and shall also in such event, at the request, costs and charges in the law of the said mortgagor, his heirs or assigns, convey and assure unto the said mortgagor, his heirs or assigns, or to such person or persons as he shall direct and appoint, all such parts of the said lands, tenements, hereditaments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs, executors, administrators or assigns, in the meantime, so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode; Provided always, and it is hereby

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further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale and other the powers and provisions contained in these presents, the said mortgagee, his heirs, executors, administrators or assigns, shall have and be entitled to his right of foreclosure of the equity of redemption of the said mortgagor, his heirs and assigns in the said lands, tenements, hereditaments and premises as fully and effectually as he might have exercised and enjoyed the same in case the power of sale, and the other former provisos and trusts incident thereto had not been herein contained.

The effect of the present clause and of the decisions thereon has been considered by the author in another work more fully than can pertinently be done here (*p*). We may, however, give the gist of the decisions bearing on this clause.

*Power of sale without notice*:—In *Re Gilchrist and Island* (*q*) the mortgage purporting to be in accordance with the present Act contained the following proviso: "Provided that the said mortgagee on default of payment for two months, may, without giving any notice, enter on and lease or sell the said lands." Assignees of the mortgage attempted to sell under this power. But it was held that they could not confer a good title, as in construing this power resort could not be had to the long form in column two, inasmuch as notice was dispensed with, which was not a mere exception from, nor qualification of, the short form in column one, but an abolition of one of its most important terms. Accordingly the power being left to its own force no one but the *persona designata*, i.e., the original mortgagee, could exercise it (*r*).

A still stricter view has been taken in a recent article in the *Canada Law Times* (*s*), attempting, with consider-

(*p*) Treatise on Power of Sale at pp. 35-51.

(*q*) 11 O. R. 537 (1896).

(*r*) See 51 V. c. 15 (Ont.) and 53 V. c. 27, *supra* for present state of law as to such powers.

(*s*) 13 C. L. T. 36, by Mr. A. C. Galt, citing *People's Loan & Deposit Co. v. Grant*, 18 S. C. R. 262 (1896); *Story on Eq.* 1019; *Kelley v. Imperial Loan Co.*, 11 S. C. R. 516 (1885); *Canada Permanent v. Teeter*, 19 O. R.

able force, to shew that powers of sale without notice are merely void, as offending against the rules of equity in two particulars; they fetter (if they do not actually destroy) the equity of redemption, and they fall within the category of unconscionable bargains (t).

*New trustee in a better case than an assignee*:—A new trustee stands in the place of the former trustees (u), and can exercise a power of sale, (though not in conformity with the Short Forms Act), not as an assignee of the estate but as if appointed a trustee by the deed creating the trust (v).

In *Re British Canadian Loan and Investment Company and Ray* (w) the power was:—"Provided that the company on default of payment for two months may, without any notice, enter on and lease or sell the said lands." After more than two months' default the mortgagees entered, and after having done so made the contract for sale, and served notice of exercising the power of sale on some of the subsequent incumbrancers personally and upon the solicitors of others: *Held*, that if the Act were applicable, the power of sale was properly exercised; if the Act were not applicable, then taking the words in their strictest sense, the vendors had done all that the power required: and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all.

(1889); *Parkinson v. Hanbury*, 1 Dr. & Sm. 143 (1860); *Jenkins v. Jones*, 2 Giff. 99 (1860); *Toomes v. Conset*, 3 Atk. 261 (1745); *Jennings v. Ward*, 2 Vern. 520 (1705); *Broad v. Selfe*, 11 W. R. 1036 (1863); *Barrett v. Hartley*, L. R. 2 Eq. 795 (1866); *Miller v. Cook*, L. R. 10 Eq. 641 (1870); *Salt v. Marquess of Northampton*, L. R. 1892, A. C. 1, and some of the cases cited under the present clause.

(t) See recent case *Chatfield v. Cunningham*, 23 O. R. 153 (1893). Where the power was a power exercisable without notice.

(u) By R. S. O. 1887, c. 110 s. 3.

(v) *Re Gilmour and White*, 14 O. R. 694 (1887).

(w) 16 O. R. 15 (1888), *Street, J.*

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*Necessity, for entry on the land*:—In *Clark v. Harvey* (c) the power was: "Provided that the mortgagee on default for one day may, without any notice, enter on and lease or sell said lands." The question arose could the power be exercised before entry made upon the land. Galt, C.J., held that the case was distinguishable from *Re Gilchrist and Island*, and that an entry was not necessary prior to sale. On an appeal the court was equally divided. The opinions of the judges in this case are valuable as shewing the very opposite methods that may be employed in interpreting instruments that purport to be made in pursuance of the Short Forms Acts.

*Power exercisable on one month's default*:—In *Re Green and Arlkin* (y) the power was: "Provided that the said mortgagee on default of payment for one month may on giving notice in writing enter on and lease or sell the said lands." It was held that the substitution of "one month" for "months" was not a material variation in the form, and that the assignee could make a good title.

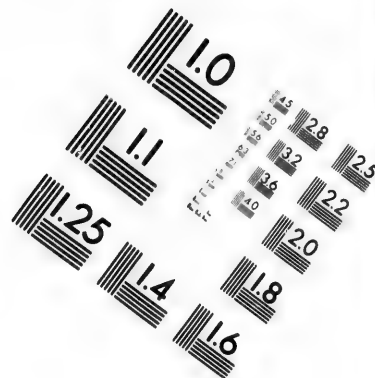
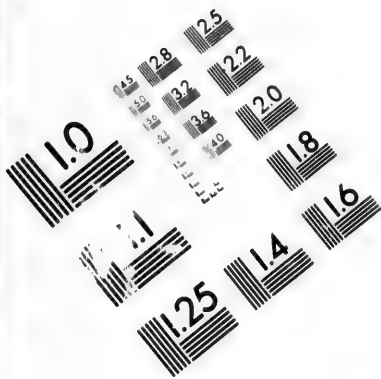
In *Barry v. Anderson* (z) the power was:—"Provided that the said mortgagees on default of payment for one month, may on ten days' notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice. And also that any contract of sale made under the said power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators and assigns, may buy and resell without being responsible for any loss or deficiency on resale." It was held, Burton, J.A., dissenting, that the power of sale could be validly exercised by the assigns of the mortgagees.

(c) 16 O. R. 159 (1888).

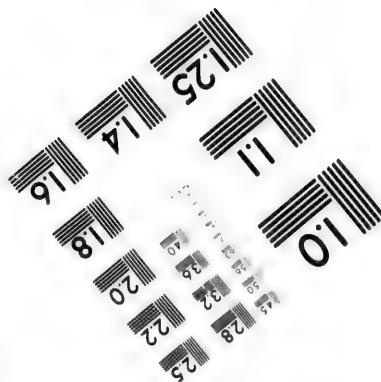
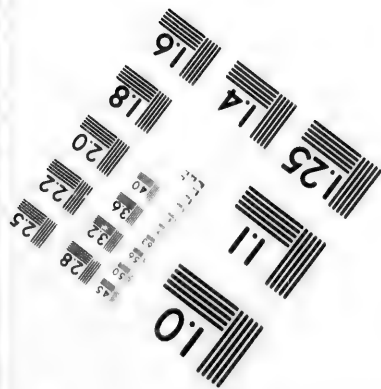
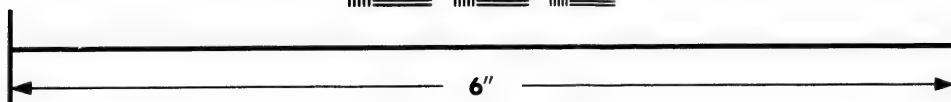
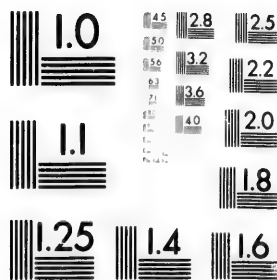
(y) 14 O. R. 697 (1887).

(z) 18 A. R. 247 (1891).

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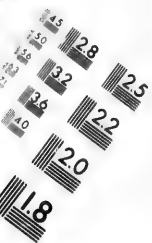


# IMAGE EVALUATION TEST TARGET (MT-3)



# Photographic Sciences Corporation

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(716) 872-4503**



*Exercise of power of sale cannot be treated as a nullity*:—In *Patterson v. Tanner* (a), the mortgagees sold under power to one of the original mortgagors, who had disposed of his equity. The purchaser having refused to carry out his contract, the mortgagees did not insist upon his doing so, but tried to fall back on his original covenant. Mr. Justice Street, however, decided as follows:—"The mortgagees, having exercised their power of sale and entered into a contract to sell the mortgaged premises, cannot be permitted without some sufficient reason to treat the sale as a nullity, and fall back upon their mortgage as if the exercise of the power had been a mere matter of form. See the statutory form of the power of sale at p. 972 of the Revised Statutes of Ontario."

*"Mortgagor, his heirs or assigns"*:—Execution creditors of the mortgagor are "assigns" (b).

*"At his or their usual or last place of residence"*:—This permits substitutional service at the residence, though the mortgagor may be within the jurisdiction. But even if such is not the proper construction of the statute, it is a matter so doubtful that the solicitor who *bona fide* acted on that view of the statute should not lose his costs of so effecting service (b).

*"Not less than            previous"*:—See *Grant v. Canada Life Ass. Co.* (d).

*"To sell and absolutely dispose of"*:—See *Beatty v. O'Connor* (e), *Rodburn v. Swinney* (f), *Smith v. Spears* (g), *Stewart v. Rowson* (h).

(a) 22 O. R. 366 (1892).

(b) *Re Abbott and Medcalfe*, 20 O. R. 299 (1891).

(c) *O'Donohoe v. Whitty*, 2 O. R. 424 (1882), 20 C. L. J. 146.

(d) 29 Gr. 256 (1881), when notice concurrent with default.

(e) 5 O. R. 731 (1884), partly cash, partly credit.

(f) 16 S. C. R. 297 (1888), sale on credit by agent under power of attorney.

(g) 22 O. R. 286 (1892), sale by way of exchange.

(h) 22 O. R. 533 (1892), attempt to sell timber alone under power.

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(t) 22

"By public auction or private contract":—In the recent case of *Chatfield v. Cunningham* (i) it was held that a sale by private contract, after a foreclosure, which had been opened by action on the covenant, was a valid exercise of the power of sale, a previous attempt to sell by public auction having proved abortive.

"To pay and satisfy the costs":—See *Re Crerar and Muir* (j), *Re McDonald, McDonald and Marsh* (k), *Re Cronyn, Kew and Betts* (l), *O'Donohoe v. Whitty*, cited *supra*.

"And shall pay the surplus":—See *Green v. Hamilton Provident Loan Co.* (m), *Harper v. Culbert* (n), *Re Crosskerry* (o), *Discher v. Canada Permanent L. & S. Co.* (p) *MacLennan v. Gray* (q), *Re Kingsland* (r), *Boulton v. Rowland* (s), *Reddick v. Traders' Bank of Canada* (t).

For distinction between the powers of taking possession and leasing under proviso No. 7 and proviso No. 14 see notes under No 7, *supra*.

## COLUMN 1.

15. Provided that the mortgagee

## COLUMN 2.

15. And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in

(i) 23 O. R. 153 (1892). *Street, J.*, following *Carver v. Richards*, 27 Beav. 458; *Kelly v. Imperial Loan Co.*, 11 S. C. R. 516.

(j) 8 P. R. 66 (1879), taxation by subsequent mortgagee.

(k) 8 P. R. 88 (1879), no taxation where costs already paid.

(l) 8 P. R. 372 (1880), ditto.

(m) 31 C. P. 574 (1881), nature of claim to surplus.

(n) 5 O. R. 152 (1883), payment to apparent owner of equity.

(o) 16 O. R. 207 (1888), dower in surplus. See also under Covenant No. 1, *supra*.

(p) 18 O. R. 273 (1889), dower in surplus.

(q) 16 A. R. 224 (1889), (see the Ontario Dig. 561), dower in surplus.

(r) 8 P. R. 77 (1879), payment into court.

(s) 4 O. R. 720 (1883), costs in action for account of surplus.

(t) 22 O. R. 449 (1892), jurisdiction of County Courts as to surplus.



## COLUMN 1.

may distrain  
for arrears  
of interest.

## COLUMN 2.

payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs, executors, administrators or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and, by distress warrant, to recover by way of rent reserved, as in the case of a demise, of the said lauds, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

*Written v. printed provisions:* — In *McKay v. Howard (u)*, the mortgage was in the statutory form except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unerasd in its usual place, viz. after the covenant. The question then arose could the mortgagee legally distrain? Boyd, C. — "The mortgage in this case is in the usual printed statutory short form, with certain written additions. There is the distress clause printed, but there is a prior written clause providing that the mortgagee shall look to the land alone for payment. These are inconsistent and contradictory provisions, so that the question arises which shall prevail. For two reasons the earlier controls both, because it is the first in the deed, and because it is in writing. The principle of construction is thus laid down by Lord Ellenborough in *Robertson v. French*, 4 East, at p. 136: 'If there should be any reasonable doubt upon the sense and meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than to the printed words inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are

(u) 6 O. R. 135 (1883).

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a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects' (v).

"Again, the rule of law is that in the construction of deeds where several parts are irreconcilable, the first shall prevail, the reverse being the rule as to wills, where the last governs" (v).

## COLUMN 1.

16. Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.

## COLUMN 2.

16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interest money hereby secured or mentioned, or intended so to be, or any part thereof, then and in such case the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner and with the like consequences and effects, to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs or assigns, shall on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered, or within such time as, by the practice of the High Court, relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.

*Acceleration optional, but mortgagee bound by his option*:—"It is a good rule to apply as far as possible in all proceedings, that where anything is sought by a party he should be treated as prepared to receive what he asks for (x) . . . In the case of a mortgage security if the plaintiff seeks to recover for overdue interest alone let him do so. If to get in the whole sum upon the default then let him claim that" (y).

(v) See further *Gumm v. Tyrie*, 4 B. & S. 713; *Clark v. Woodruff*, 83 N. Y. 518, also cited by *Boyd, C.*

(w) *Boyd, C.*, *ib.* at p. 137, citing *Burton on Real Property*, 8th ed. p. 173; *Bennett v. Foreman*, 15 Gr. 117 (1868).

(x) Cf. *R. S. O.* (1887) c. 102 s. 31 *supra*.

(y) *Boyd, C.*, in *Cruso v. Bond*, 1 O. R. 384 (1882). Overruling *Drummond v. Guickard*, 2 Chy. Ch. 134.

"Upon default in payment of interest or money secured by a mortgagor, the mortgagee had the right to call in the mortgage debt, and proceedings could only be stayed on payment in full being made: *Cameron v. McRae*, 3 Gr. 311; *Goodwith v. North*, 11 J. B. Moo. 491. To mitigate the harshness of this rule General Orders 461 and 462 (z) were passed in 1853, which empowered the Court to grant relief in such cases upon payment of the sum actually in arrear whether of principal or interest: *Knapp v. Cameron*, 6 Gr. 563. The statutory covenant providing for the payment of the principal in default of payment of interest (a) merely gives expression to that which was the law of the Court, and is not intended to interfere with the effect of the general orders: *McLaren v. Miller*, 20 Gr. 639. The general orders were passed in case of the mortgagor, so as to enable him to repair the forfeiture incurred at a less cost than the whole amount secured by the instrument, unless it was actually overdue by lapse of time, But except in this regard the law was otherwise unchanged, and the Court always had jurisdiction to stay proceedings upon payment of the full amount of the plaintiff's claim for debt, interest and costs in mortgage, as well as in other cases: *Praed v. Hall*, 1 S. & S. 331, *Laurence v. Humphries*, 11 Gr. 211" (b).

*Relief against acceleration*:—The above decision left considerable ambiguity as to whether a Court of Equity would relieve against the acceleration of the principal. Thus Haggarty, C.J. Q.B., said: "I do not clearly understand the exact state of the law on this subject in our Court of Chancery looking at the cases from *Knapp v. Cameron*, 6 Gr. 559. . . . down to *Cruso v. Bond*,

(z) C. R. 359, 360.

(a) The present covenant.

(b) *Boyd, C.*, in *Cruso v. Bond*, 9 P. R. 111 (1881).

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and *Tylee v. Hinton*. I fully concur with the expression of opinion of Moss, C.J.A., at p. 60 of *Tylee v. Hinton* (c)."

The opinion referred to is: "If it is a part of the bargain made upon a sale of lands that the unpaid balance of the purchase money shall be secured by a mortgage providing for payment by instalments if these payments are made punctually, but accelerating the payment in the event of default, I am not at present able to perceive that the Court of Chancery could, either by virtue of the General Order or its inherent jurisdiction to relieve against penalties and forfeitures restrain the vendor from insisting upon payment in full upon default being made (d).

"The Judicature Act (e), gave the High Court jurisdiction to relieve against penalties, forfeitures, etc., but the acceleration of the principal does not seem properly to come under the scope of such relief. As Knight Bruce L.J., says in *Sterne v. Beck* (f). 'The deed provides for payment of the debt by instalments . . . and further provided that in a certain event payment of the debt should be accelerated. It did not provide that the amount payable should be increased, but only provided that instead of being paid at future periods with interest up to those periods it should become payable at once with interest up to that time. To a proviso of such a nature none of the principles of equity relating to relief in the case of penalties are in my opinion applicable.' "

*Acceleration for other causes than non-payment*:—In *Graham v. Ross* (g) the default was in the building of a log house within one year, there being a provision for

(c) *Graham v. Ross*, 6 O. R. 154 (1883).

(d) *Tylee v. Hinton*, 3 A. R. 60 (1878).

(e) R. S. O. 1887, c. 44, s. 52 (3).

(f) 1 DeG. J. & S. 595 (1864) cited in *Graham v. Ross*, *supra*.

(g) 6 O. R. 154 (1883).

acceleration in the event of such default. It was held that the plaintiff could insist on a "forfeiture of the extended terms of payment" and that the Court could not give relief. "I do not see how equity can relieve against this breach. No compensation can be either estimated or awarded to the plaintiff in respect of such a default. Relief is given against forfeiture for non-payment of rent, and in certain cases for neglecting to insure. I have found no case in which a default like the present has been relieved against" (*h*).

## COLUMN 1.

17. Provided that until default of payment the mortgagor shall have quiet possession of the said lands.

## COLUMN 2.

17. And provided also, and it is hereby further expressly declared and agreed by and between the parties to these presents, that until default shall happen to be made of or in the payment of the said sum of money hereby secured or mentioned, or intended so to be, or the interest thereof, or any part of either of the same, or the doing, observing, performing, fulfilling, or keeping some one or more of the provisions, agreements or stipulations herein set forth, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said mortgagor, his heirs and assigns, peaceably and quietly to have, hold, use occupy, possess and enjoy the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof to his own use and benefit, without let, suit, hinderance, interruption, or denial of, or by the said mortgagee, his heirs, executors, administrators or assigns, or of, or by any other person or persons whomsoever lawfully claiming, or who shall, or may lawfully claim by, from, under or in trust for him, her, them or any or either of them.

R. S. O. 1877, c. 104, Schedule B.

(*h*) *Per* Haggarty, C.J., Q.B., *ib* ; *Graham v. Ross*, is followed in *Wilson v. Campbell*, 15 P. R. 254 (1893) by *Boyd, C.*

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(d) See 2  
ments.

## DEVOLUTION OF ESTATES.

The chapter of the Revised Statutes, 1887, known as "The Devolution of Estates Act," is composed of several very distinct enactments, and represents very different stages of the law relating to the descent of property. First, there was the law of descents as existing in Upper Canada before the first day of July, 1834, and represented by section 12 *infra*. Secondly, there was the law of descents introduced into Upper Canada in 1834 by 4 Wm. IV. c. 1 (a), and represented by sections 13 to 36 *infra*. Thirdly, there was the law of descents introduced by the Act to abolish the Right of Primogeniture, etc. (b), and represented by sections 27 to 57 *infra*. Then, fourthly but not finally, came "The Devolution of Estates Act" proper, *i.e.*, 49 V. c. 22 (Ont.), passed in 1886, which is represented by sections 1 to 9 *infra*. This last enactment has been said to have been taken from an Act of the Province of New South Wales (c). But, according to other authority, is taken from a bill introduced by Sir Horace Davey into the British House of Commons, on Feb. 13th, 1884 (d).

*Effect of 49 V. c. 22:*—"The effect of this Act is to abolish the distinction between real and personal property for the purposes of administration and to devolve the whole estate upon the personal representative.

(a) 3 & 4 Wm. IV. c. 106 (Imp.).

(b) 14 & 15 V. c. 5 (Can.).

(c) 26 V. c. 20 (N. S. W.). See *Martin v. Magee*, 18 A. R. 388 (1891); *Plumley v. Shepherd*, L. R. 1891, A. C. 244.

(d) See 29 C. L. J. at p. 619, being a review of the Act and its amendments.

"No greater change has been effected in the law by any recent legislation. When its far-reaching consequences are properly apprehended, it may be found that the absorption of realty and personalty tends to systematize jurisprudence in much the same way as the absorption of law by equity (*e*).

*The real representative*:—The person entitled to represent a deceased owner of realty, in respect to that realty, has undergone so many changes of character and name, as to have excited much speculation and not a little mirth on the part of the legal profession. Thus, prior to 1834, the "real representative" was the person well known to the law of real property as the heir-at-law. From 1834 to 1852, somewhat different rules were introduced for ascertaining the rightful heir-at-law. The abolition of primogeniture, taking effect in 1852, allowed a group of co-heirs in place of the person formerly known as the heir-at-law. As this last-mentioned state of affairs had its inconveniences, an Act was passed in 1857 making the Judge of the Surrogate Court the real representative for all real property within the county, etc. (*f*). Then came the Act, of 1886, vesting the real property mentioned in the Act, in the legal personal representatives (*g*), and empowering them to dispose of and otherwise deal with the same (*h*). This was supplemented in 1887 by a provision that the personal representative shall be deemed in law the deceased's "heirs and assigns" (*i*). But this has again been qualified by an Act of 1891, which vests the real estate not disposed of within a year in "the devisees or heirs beneficially entitled thereto" (*j*). Nor was the last-mentioned

(*e*) *Re Reddan*, 12 O. R. 781 (1886), Boyd, C.

(*f*) 20 V. c. 65 (Can.), now R. S. O. 1887, c. 104, s. 4, which see.

(*g*) Section 4 (1) *infra*.

(*h*) Section 9 *infra*.

(*i*) 50 V. c. 7 (Ont.), s. 35; s. 10 *infra*.

(*j*) 54 V. c. 18 (Ont.), s. 1.



Act final; for the past year has brought forth "An Act respecting the time for the Vesting of Estates in Heirs and Devisees (*k*).

Who, then, is the real representative of the property of persons dying since 1st July, 1886? Taking all the above-mentioned provisions as consistent, we may say that (1), During one year after the owner's decease, in the first place, the Judge of the Surrogate Court is the real representative; then, the position shifts to the personal representatives, *i.e.*, persons to whom probate or administration is granted; and (2) *after one year from the owner's decease*, the real representatives are the personal representatives, if they file a caution; or if they do not file a caution, then the position shifts to "the devisees or heirs beneficially entitled thereto." Doubtless, the phrase "heirs beneficially entitled thereto" stands for the persons among whom the property would be distributed according to section 4 (1) *infra*.

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(k) 56 V. c. 20 (Ont.).

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R. S. O. 1887, CHAPTER 108.

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R. S. O. 1887, CHAPTER 108.

An Act respecting the Devolution of Real Estate.

SHORT TITLE, s. 1.

APPLICATION OF SECTS. 3-10, ss. 2, 3.  
PROPERTY TO DEVOLVE ON PERSONAL  
REPRESENTATIVE, s. 4.

DISTRIBUTION OF PROPERTY OF MAR-  
RIED WOMAN DYING INTESATE,  
s. 5.

DISTRIBUTION OF ESTATE OF PERSON  
DYING INTESATE AND WITHOUT  
ISSUE, s. 6.

APPLICATION OF PROPERTY IN PAY-  
MENT OF DEBTS, s. 7.

SALES OF INFANTS' ESTATE, s. 8.

POWER OF PERSONAL REPRESENTA-  
TIVE OVER REAL PROPERTY, s. 9.

PERSONAL REPRESENTATIVES TO BE  
DEEMED IN LAW HEIRS AND AS-  
SIGNS, s. 10.

INTERPRETATION OF TERMS IN SEC-  
TIONS 12-26, s. 11.

DESCENTS BEFORE 1ST JULY, 1834,  
s. 12.

DESCENTS SINCE 1ST JULY, 1834, ss.  
13-20.

DESCENTS BETWEEN 1ST JULY, 1834,  
AND 1ST JANUARY, 1852, ss.  
21-26.

DESCENTS SINCE 1ST JANUARY, 1852,  
ss. 27-57.

HER MAJESTY, by and with the advice and consent  
of the Legislative Assembly of the Province of  
Ontario, enacts as follows:—

1. This Act may be cited as "*The Devolution of Estates Act*," Short title.  
49 V. c. 22, s. 1.

"*Devolution*":—For meaning of this term see section  
8 *infra* and notes thereunder.

2. Sections 3 to 10 inclusive of this Act shall apply only to      Applica-  
the estates of persons dying on and after the 1st day of July,      tion of ss.  
1836. 49 V. c. 22, s. 2.      3-10.

*1st day of July, 1836*:—This was the date fixed for  
commencement of 49 V. c. 22 (Ont.)

"*Dying on or after*":—The result of this phraseology  
is that, no matter what the date of the will, the date of

the testator's death determines whether the Act applies or not (*l*).

3. Subject as above this and the next seven sections of this Act shall apply :—

Estates to which ss. 3-10 apply.

(a) To all estates of inheritance in fee simple, or limited to the heir as special occupant, in any tenements or hereditaments in Ontario, whether corporeal or incorporeal.

"Or limited to the heir as special occupant" :—Where a man dies having an estate *pur autre vie* (for the life of another), the tenancy as special occupant may arise. Wharton says of it :—"Where an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee dies without alienation, and while the life for which he held continues, the heir will succeed, and he is called a special occupant. See 7 Wm. IV. and 1 V. c. 26, ss. 3, 6" (*m*).

(b) To chattels real in Ontario.

"Chattels real" :—"Chattels *real*," saith Sir Edward Coke (*n*), "are such as concern, or savour of, the realty ; as, terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by statute—merchant, statute staple, *elegit*, or the like ; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates ; of which they have one quality, viz., immobility, which denominates them *real* ; but want the other, viz., a sufficient, legal indeterminate duration ; and this want it is that constitutes them *chattels*" (*o*).

(c) To all other personal property of any person who has died domiciled in Ontario.

(*l*) Cf. Tillis v. Springer, 21 O. R. 587 (1892).

(*m*) Law Lexicon, 7th ed. 784.

(*n*) 1 Inst. 118.

(*o*) Blackstone Com. II. 386.

(*p*) 3rd (1863) ; L. 36 Ch. D. 622 Pro. & Di  
(*q*) Wes

"*In Ontario*":—It will be noticed that as to real property and chattels real, they are to be situated in Ontario, while as to other personal property it may be situate elsewhere than in Ontario, provided the owner has died *domiciled* in Ontario. This distinction illustrates one of the many difficulties that interfere with a complete assimilation of the laws of succession to real and personal property.

Mr. Westlake, in his work on Private International Law, says:—"Where the court of a *deceased person's last domicile* has had an opportunity of declaring who are entitled to the beneficial interest in his *personal* property, subject to payment of his debts, funeral expenses, and expenses of administration, its authority is regarded in England as final, whether the question arises on a claim to a grant of administration, on a claim to be heard as contradictor to a will propounded for probate, in the distribution of the English assets after payment of debts and the other expenses above mentioned, or in any other way" (*p*).

But of *realty* and immovable property the same author says:—"All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*. . . . English real estate descends on intestacy according to English law, whatever may have been the personal law of the intestate" (*q*).

In order, therefore, to completely assimilate the laws of succession as to realty and personalty it will be necessary to abandon the distinction between property in immovables and property in movables. On this point Savigny says:—"On impartial consideration, it must be admitted that the great changes in respect of property and commerce which

(*p*) 3rd Ed. s. 60, p. 95. Citing: *Crispin v. Doghioni*, 3 S. & T. 96 (1853); L. R. I. E. & I. A. (1866). See further *Re Trufort*, *Trafford v. Blanc*, 36 Ch. D. 600 (1887); *Lynch v. Provisional Government of Paraguay*, L. R. 2 Pro. & Div. 268 (1871).

(*q*) Westlake, 3rd Ed. ss. 156, 168, 178, 179.

have taken place in modern times, tend to the abandonment of that sharp distinction" (*r*). Further, the same author—in speaking of the opinion which "adopts the *lex rei sitae* as to immovable property, and for all other effects (movable property and obligations) the law of the domicile of the deceased"—says (*s*):—"All the reasons urged against the previous opinion (*t*) are valid against this, only in a less measure, because it differs from the correct one (*u*) in a less extensive sphere. This opinion has prevailed chiefly since the sixteenth century. In Germany it has been more and more displaced since the eighteenth century. On the contrary, it has survived till our own time in England and America (*v*), as well as in France. It stands in connection with the general distinction, which is firmly maintained in the practice of these countries between movable and immovable estate."

Provided, that all real or personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section, if otherwise applicable. 49 V. c. 22, s. 3.

*General testamentary power of appointment*:—"An important distinction is established between general and particular powers. By a general power we understand a right to appoint to whomsoever the donee pleases. By a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee

(*r*) Private International Law; Translation by Guthrie, 1869, s. 360, p. 93.

(*s*) *Ib.* s. 376, p. 225, 226.

(*t*) *i.e.* that the succession to *all* property should be governed by the *lex rei sitae*.

(*u*) *i.e.* that the succession to *all* property should be governed by the law of last domicile.

(*v*) Citing Story, Chaps. XI. XII.

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to limit a *fee*, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so" (*w*).

The power mentioned in the present Act is, however, a "testamentary" power of which the same author, says:—"A power to be executed by will cannot be executed by any act to take effect in the life time of the donee of the power (*x*).

*Effect of present section*:—The effect then of the present section, as far as concerns pure realty, is to affect estates of inheritance in fee simple, property given under general testamentary powers (which are equivalent to fees simple), and estates *pur autre vie* where the grantee is dead, and the *cestui que vie* is still alive; but not to affect property in strict settlement as where estates tail or particular testamentary powers are limited.

4. (1) All such property as aforesaid which is vested in any person, or is comprised in any such disposition as aforesaid made by him, shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed.

Property to devolve on personal representative.

*General residue of real and personal estate*:—"There is no difficulty in administration and distribution of the residue of the real and personal estate; it is all to be treated as one fund and as if it were all personalty; s. 4, c. 108, R. S. O.; *Re Reddan*, 12 O. R. 781" (*y*).

*Can a devisee make good title*:—"It appears to me that the plainly expressed intention of this legislation is to vest in the legal personal representative all the real property of

(*w*) Sugden on Powers, 6th Ed. 495.

(*x*) *Ib.* 270.

(*y*) *Scott v. Supple*, 23 O. R. 393 (1893), Street, J.



the deceased *as if the same were* personal property. The Act does not say it is to devolve upon them so far as it has not been disposed of. They take it absolutely subject to the payment of debts, and debts being satisfied it is to be 'distributed' as personal property is distributed, except so far as it is disposed of by deed, will or other effectual disposition. If it has been disposed of by will the personal representatives, when the debts are paid, or if there are no debts, have the bare legal estate for the devisee as the learned Chancellor says in the judgment below.

"The latter is then the beneficial owner, but not having the legal estate he cannot, whether the debts are paid or not, make a good title without a conveyance from that person in whom the legal estate is outstanding. If the debts are paid or there are no debts, he may compel such conveyance, but the purchaser is entitled to it, as he must have both the legal and beneficial estate to complete his title" (c).

*Title in devisees after one year*:—The effect of the foregoing decision is, of course, modified by the provisions of 54 V. c. 18 (Ont.) (a), enacting that the realty undisposed of within twelve months after the death of the testator or intestate shall vest in the "devisees or heirs beneficially entitled" without any conveyance from the executors or administrators.

*Are devisees necessary parties?*—"I am of opinion now since the Devolution of Estates Act that these devisees are not proper parties, at all events they are not necessary parties. The estate in the lands has devolved to the personal representatives of the person who died seised, and for all purposes of this action they are the proper parties, defendants" (b).

(c) Osler, J.A., in *Martin v. Magee*, 18 A. R. 388 (1891), reversing 19 O. R. 705, which treated the point as a question of conveyance, not of title.

(a) Section 1, which again is modified by 56 V. c. 20 (Ont.). See *infra* for text of these Acts.

(b) Robertson, J., in *Malone v. Malone*, 17 O. R. 103 (1889); an action to recover dower.

(c) And  
(d) Stoc  
therein.

(e) 21 C  
creditors.

This last cited decision was given before the passing of 54 V. c. 18; probably in view of that enactment the devisees would be proper parties.

*"Legal personal representative"*:—"Personal representative—an executor or administrator: he represents the person of the deceased as to personal estate" (c). "The primary meaning of 'representatives,' 'legal representatives,' 'personal representatives,' or 'legal personal representatives,' when unaccompanied by explanatory or controlling words is 'executors or administrators' in their official capacity" (d).

*Distinction between trustees and executors*:—"Formerly it was the correct phraseology for a testator to speak of his "executors and trustees"; that is, the word "executors" referred more particularly to the duties to be performed in regard to the winding up of the testator's personal estate, while the word "trustees" referred to the disposition of the testator's realty. The Devolution of Estates Act did much to destroy this distinction: as expressed in *Tillie v. Springer* (e), "since the Devolution of Estates Act . . . the representatives of the estate for all purposes may be regarded as the executors. The distinctions once existing between the administration of real and personal estate, if not now annihilated are so minimized as not to be of practical importance in the solution of such questions as arise in this action."

*"Distributed"*:—"The object of this statute was plainly to assimilate, as far as possible, the conditions, succession, and mode of distribution of real and personal property. In the 4th and 5th sections, for the first time that I am

(c) Anderson's Dictionary of Law, 884. See 2 Steph. Com. 7th Ed. 198.

(d) Stockdale v. Nicholson, L. R. 4 Eq. 365 (1867), and cases cited therein.

(e) 21 O. R. 587 (1892), Boyd, C., case of assignment for benefit of creditors.

aware of in any legal writing, is the expression 'distributed' used in reference to real property" (*f*).

*Personal property in this and in Surrogate Act*:—In *Re Nixon* (*g*), the question argued was whether since the Devolution of Estates Act the words "personal estate" in s. 31, s-s.2 of the Surrogate Courts Act, R. S. O. c. 50, are to be taken to include real estate. The decision of Boyd, C., was in the negative: "By the Surrogate Act, probate shall have effect over the personal estate of the deceased in all parts of Ontario: R. S. O. c. 50, s. 18, s-s. 4. By ss. 30, 31 of the Act, contests about probate may be removed to the High Court, but not unless the personal estate exceeds \$2,000 in value. The personal estate here is much less, but if land is included, the total estate exceeds \$2,000. The testator has died since the Devolution of Estates Act has come into operation: R. S. O. c. 108; and it is urged that the old distinction between realty and personalty is no longer significant, but the whole estate is now to be administered as personalty, and that the test in removing to the higher tribunal is the value of the whole, and not merely of the personal estate. It may be that the Legislature would be disposed to strike out the word "personal" in s. 31 of the Surrogate Courts Act in order to better adapt its provisions to that of the Devolution of Estates Act, but I do not feel clear that it is the province of a judge to reject it. The distinction between personal and real estate, so far as nomenclature is concerned, is kept up in both statutes and notwithstanding my first impression during the argument, it is better to let the words as they stand have their appropriate effect."

The judicial hint to the Legislature to strike out the word "personal" bore fruit in the following year, for 48 V. c. 17, being "an Act to amend the Surrogate Courts

(*f*) *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397-402 (1891). Falconbridge, J.

(*g*) 13 P. R. 314 (1889).

(*h*) See High Court Courts Act prescribe Courts Act Acts may Sec. 20 found to co Estates Act amended so of The Dev

Act" expunged the words "personal estate" and substituted the word "property," and made provision by sections 19 and 20 for effectuating the intention of the Devolution of Estates Act (*h*).

*Appointment of administrator ad litem*.—Consolidated Rule 311 provides:—"Where no probate of the will of a deceased person or letters of administration to his estate, have been granted by a Surrogate Court, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator or administrator *ad litem* (according as the case may require) to the estate; and the person so appointed shall give the security required from, and have the rights, authority and responsibility of, an administrator or administrator *pendente lite* (as the case may be) appointed by the Surrogate Court, but the Court may dispense with such security." In *Re Williams and McKinnon* (*i*), an application was made under this rule for the appointment of an administrator *ad litem*, the action being for the cancellation of an agreement for purchase. It appeared that McKinnon died intestate in 1887, his realty being his interest in said agreement and his personalty amounting to from fifty to one hundred dollars. It also appeared that no administration had been applied for and that the widow did not intend to apply. Boyd, C. said: "Con. Rule 311, under which this application is made was originally a part of the statute found in 48 V. (c. 13, s. 11) a year prior to the introduction of the Devolution of Estates Act, 49 V. c. 22 (R. S. O.

(*h*) Sec. 19:—The Judges of the Supreme Court of Judicature and of the High Court respectively shall be deemed to have under s. 78 of *The Surrogate Courts Act*, authority to make rules of Court as therein mentioned, and to prescribe forms for carrying into effect the intention of the said *Surrogate Courts Act*, *The Devolution of Estates Act*, and of this Act so far as the said Acts may affect proceedings in the Surrogate Courts.

Sec. 20.—Wherever the provisions of *The Surrogate Courts Act* shall be found to contradict or be inconsistent with the provisions of *The Devolution of Estates Act*, the said *Surrogate Courts Act* is to be considered and taken as amended so far as to conform in all respects with the true intent and meaning of *The Devolution of Estates Act*.

c. 108). As originally framed, it related only to personal estate, but I think it may be applied as to realty falling under the operation of that Act. If it appears that there is no personalty, or personalty of such trifling amount as will not suffice to answer the claims made in respect of the deceased's real estate against which litigation is brought, or is impending, then it is competent for the Court to act under Con. Rule 311 and grant administration *ad litem*, limited to the real estate in question.

"It is also proper practice, in my opinion, to apply, as here, before action."

#### DISTRIBUTION OF PERSONAL PROPERTY.

*The Statutes of Distribution*: 22 & 23 Car. II. c. 10,  
An Act for the better settling of Intestates' Estates.

Ordinaries  
may call  
administra-  
tors to  
account, and  
make dis-  
tribution  
amongst the  
wife and  
children, etc.

1. "And also that the said ordinaries and judges respectively shall and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof to order and make just and equal distribution of what remaineth clear (after all debts, funerals and just expenses of every sort first allowed and deducted) amongst the wife and children, or childrens' children if any such be or otherwise to the next of kindred to the dead person in equal degree or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases and the rules and limitations hereafter set down, and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of His Majesty's ecclesiastical laws.

How and  
to whom  
surplus to be  
distributed.

3. Provided always and be it enacted by the authority aforesaid that all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate shall distribute the whole surplusage of such estate or estates in manner and form following, that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate and

(i) 14 P. R. 338 (1891) in Chambers. The Chancellor cites *Re Chambers*, 12 P. R. 649; *Dey v. Dey*, 2 Gr. 149; *Davis v. Chanter*, 2 Phill. 545; *Dean of Ely v. Gayford*, 16 Beav. 561; and distinguishes *Aylward v. Lewis* (1891), 2 Ch. 81.

such persons as legally represent such children in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made.

And in case any child other than the heir-at-law who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated. But the heir-at-law notwithstanding any land that he shall have by descent or otherwise from the intestate is to have an equal part in the distribution with the rest of the children without any consideration of the value of the land which he hath by descent or otherwise from the intestate. And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them.

4. Provided that there be no representatives admitted among collaterals after brothers' and sisters' children, and in case there be no wife then all of the said estate to be distributed equally to and amongst the children, and in case there be no child then to the next of kindred in equal degree of, or unto the intestate and their legal representatives as aforesaid and in no other manner whatsoever.

5. Provided also. . . . to the end that a due regard be had to creditors that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death, and that such and every one to whom any distribution and share be allotted shall give bond with sufficient sureties in the said courts that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered or otherwise duly made to appear that then and in every such case he or she shall respectively refund and pay back to the administrator his or her ratable part of the

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residue to  
next of kin.

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No distri-  
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If debts  
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appear then  
all to refund  
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ately.

debt or debts, and of the costs of suit and charges of the administrator by reason of such debt out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

Provided  
for adminis-  
tration.

6. Provided always . . . that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo* he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made.

29 CAR. II. CAP. 3.

22 & 23  
Chas. II.  
c. 10.  
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tribution of  
the personal  
estate of  
their wives.

24. And for the explaining one Act of this present Parliament entitled, An Act for the better settling of the intestates estates, be it declared by the authority aforesaid that neither the said Act nor anything therein contained shall be construed to extend to the estates of *femes covert*s that shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates and recover and enjoy the same as they might have done before the making of the said Act.

1 Jac. II. c. 17 (An Act for Reviving and Continuance of several Acts of Parliament therein mentioned) continues 22 & 23 Car. II. c. 10 and 29 Car. II. c. 3 s. 24 (25.) It contains the following sections:—

Administra-  
tors not  
compelled  
to account  
(except by  
an inven-  
tory) but at  
the inst-  
ance of  
persons  
interested.

6. Provided always . . . that no administrator shall from the four and twentieth day of July next be cited to any of the Courts in the last Act mentioned to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof) unless it be at the instance and prosecution of some person or persons in behalf of a minor or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any of the ordinaries or judges by the said last Act empowered and appointed to take the same otherwise than as is aforesaid anything in the said last Acts contained to the contrary notwithstanding.

Brother  
and sister  
of intestate  
to share  
equally  
with the  
mother

7. Provided also . . . that if after the death of a father any of his children shall die intestate without wife or children in the lifetime of the mother every brother and sister and the representatives of them shall have an equal share with her anything in the last mentioned Acts to the contrary notwithstanding.

(j) Pe  
(k) Lor  
(1727); see  
(l) Wh  
(m) 33



## THE STATUTES OF DISTRIBUTION.

*Origin of Statutes of Distribution* :—"The occasion of making the statute of distribution was to put an end to the long contest which had been between the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or bond to be given by the administrator for that purpose, the temporal courts sent a prohibition (*j*), being of opinion, that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favour of the practice of the spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them; and the Act intended to make the children's provision equal, which was agreeable to the civil law, where goods moveable, and immoveable (*i.e.* lands) are considered as the same, though our law would never let the civil law meddle with lands" (*k*).

*Ordinary* :—"A judge who has authority to take cognizance of causes in his own right, and not by deputation.—Civ. Law.

"By the common law, one who has exempt and immediate jurisdiction in causes ecclesiastical" (*l*).

*Ecclesiastical or Spiritual Courts* :—"In England the jurisdiction of the ecclesiastical courts in testamentary matters was transferred to the Court of Probate established by 20 & 21 V. c. 71; which Court was merged in the Supreme Court by the Judicature Act and its jurisdiction assigned to the "Probate, Divorce, and Admiralty Division."

In Upper Canada the same matters were dealt with as early as 1793 (*m*), when Surrogate Courts were established

(*j*) *Pettit v. Smith*, 1 P. Wms. 7 (1695).

(*k*) Lord Chancellor Raymond in *Edwards v. Freeman*, 2 P. Wms. 441 (1727); see *Palmer v. Elliot*, 3 Mod. 58; *Carter v. Crawley*, Raym. 496.

(*l*) Wharton 7th Ed. 580.

(*m*) 33 Geo. III. c. 8.

(as well as a Court of Probate, which was afterwards abolished).

The Court of Chancery determined by the same rules as to distribution and legacies as did the ecclesiastical courts (*n*).

*Statutes of Distribution to be construed by the Civil Law*:—"I now take it to be fully settled that this Act is to be construed by the rule of the civil law; and the Statute of 1 Jac. II., I think ought to be construed in the same manner; which is an Act of continuance of the Statute of Car. II., with three additional clauses, and is to be considered as if the Statute of Car. II. had been re-enacted and repeated with these clauses" (*o*).

*Computation of degrees to be made by the civil law*:—The "rule of the *canon* law has been excluded in our courts, who compute by the *civil* law" (*p*); and not by the common law, either (*q*).

*Legal representatives*:—In 22 & 23 Car. II. this phrase signifies descendants not next of kin (*r*).

*Object of 1 Jac. II., c. 17*:—"To be sure the principal and primary intention of this statute of Jac. II. was to preserve the estate of the father to his own children in a reasonable degree, and not to let the mother run away with too much to her children by the second husband" (*s*).

*Property of foreigners*:—The personalty of foreigners situate in England passes according to the Statutes of

(*n*) *Thomas v. Ketteriche*, 1 Ves. (Sen.) 334 (1749).

(*o*) *Hardwicke, L.C.*, in *Wallis v. Hodson*, 2 Atk. 117 (1740).

(*p*) *Thomas v. Ketteriche*, 1 Ves. (Sen.) 334 (1749).

(*q*) *Mentney v. Petty*, Pre. Ch. 593.

(*r*) *Price v. Strange*, 6 Madd. 161 (1820). As to next of kin, *see Withy v. Mangles*, 10 C. & F. 215, 8 Jur. 69 (1844).

(*s*) *Wallis v. Hodson*, 2 Atk. 117 (1740).

(*t*) *Dun*  
(*u*) *In v*  
of *Jessel, M*  
(*v*) *Bay*  
(*w*) *See*  
(*x*) *Crow*

Distribution; thus leaseholds in England belonging to a domiciled Scotchman, devolve in case of his intestacy, upon the person entitled according to the English Statutes of Distribution (*t*).

But the kindred who shall take under those statutes are determined by international law:—The *Statute of Distribution* being a statute not for Englishmen only, but for all persons, English or not, dying intestate and domiciled in England, and applying universally to persons of all countries, races and religions whatsoever, the proper law for determining the “kindred” under that statute is the international law adopted by the comity of states. Accordingly a child not legitimate by English law, but legitimated by the law of Holland, where its parents were domiciled, was held entitled to a share as one of the next of kin (*u*).

*Partial intestacy*:—Where a portion of the estate was made the subject of bequests to the next of kin and the surplus was undisposed of, this surplus was ordered to be distributed among the next of kin and not to be retained by the executors to their own use (*v*).

“*No representation among collaterals*” (*w*):—This excludes the children of a deceased nephew of the intestate (*x*).

*Cousins*:—The rule in ascertaining the degree of relationship in which one person stands to another is to count up to the common ancestor, and then down again to the person whose relationship is sought. Thus the first cousin

(*t*) *Duncan v. Lawson*, L. R. 41 Ch. D. 394 (1889).

(*u*) *In re Goodman's Trusts*, L. R. 17 Ch. D. 266 (1881), reversing decision of Jessel, M.R. and disapproving *Boyes v. Bidale*, 1 Hem. & M. 798 (1864).

(*v*) *Bayley v. Powell*, 2 Vern. 361 (1698).

(*w*) See 22 & 23 Car. II., c. 10, s. 4, *supra*.

(*x*) *Crowther v. Cawthra*, 1 O. R. 128 (1882), *Boyd, C.*

twice removed is related to the *propositus* in the same degree as his second cousin; for they are both in the sixth degree (*y*).

*Uncles and aunts, nephews and nieces*:—Where the intestate's next of kin were an uncle by his mother's side and a deceased aunt's child, the latter took no share under the Statute of Distribution as there is "no representation amongst collaterals after brothers' and sisters' children (*z*). So too the son of a dead uncle is not entitled to share with a living uncle (*a*).

But aunts and uncles take equally per capita with the nephews and nieces of the intestate (*b*); and nephews and nieces themselves take per capita, being in equal degrees (*c*). Thus where an intestate left a mother, wife and brother's children infants, the Lord Chancellor directed the personalty to be divided into four parts, whereof two to be given to the wife, one to the mother, and one to be vested in stock for the children in equal shares (*d*).

Uncles and aunts are not entitled to share with the grandparent in the estate of the grandchild (*e*); but are in equal degree with the great-grandparent, *i.e.* the third degree (*f*).

The daughter of an aunt shares equally with the granddaughter of a sister (*g*).

(*y*) *Silcox v. Bell*, 1 Sim. & St. 301 (1823).

(*z*) *Bowers v. Littlewood*, 1 P. Wms. 504 (1719). Similarly as between a deceased brother's child and a deceased brother's grandchild the grandchild did not take a share, *Pett's Case*, 1 P. Wms. 25 (1700).

(*a*) *Maw v. Harding*, 2 Vern. 233 (1691); see *Carter v. Crawley*, Raym. 496; *Beeton v. Darkin*, 2 Vern. 168 (1750).

(*b*) *Lloyd v. Tench*, 2 Ves. Sen. 215 (1750); *Durant v. Prestwood*, 1 Atk. 454 (1736).

(*c*) *Stanley v. Stanley*, 1 Atk. 455 (1738); *Davies v. Dewes*, 3 P. Wms. 50 (1730); *Walsh v. Walsh*, Pre. Ch. 54.

(*d*) *Stanley v. Stanley*, *supra*.

(*e*) *Woodworth v. Wickworth*, Pre. Ch. 527.

(*f*) *Lloyd v. Tench*, 2 Ves. Sen. 215 (1750).

(*g*) *Thomas v. Ketteriche*, 1 Ves. Sen. 333 (1749).

*Grandparents and grandchildren:*—Grandparents being in the second degree, take before uncles and aunts (*f*). A grandfather on the father's side and a grandmother on the mother's side were held equally entitled (*h*). Where an intestate leaves no children, but only grandchildren and great-grandchildren, they take *per stirpes* and not *per capita* (*i*).

The grandparent shall not share with the brother of the intestate (*j*).

Shares under the Statutes of Distribution may be barred or satisfied in several ways, as by advancement; by will; by separate deed; or by marriage settlement. It would be outside the scope of the present work to do more than treat the subject of advancement, which is specially pertinent to the statutes of distribution.

*Advancement and hotchpot:*—See notes under section 53 *infra*.

*Half-blood:*—See notes under section 44 *infra*.

*Only Child:*—See under section 46 *infra*.

*Posthumous Children:*—See notes under section 47 *infra*.

(2) Nothing in this Act shall be construed to take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed-of real estate, in lieu of all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share under this section in the undisposed-of real estate aforesaid. Saving as to dower.

*How widow's election may be made:*—In *Rudd v. Hurper* (*k*), the widow brought an action for the interpre-

(*h*) *Moore v. Barham*, 1 P. Wms. 53 (1723).

(*i*) *Re Ross*, L. R. 13 Eq. 286 (1871). See also *Walker v. Gammage*, 37 Ch. D. 517 (1888), following *Lockyer v. Wade*, *Barnardist* Ch. 444.

(*j*) *Evelyn v. Evelyn*, Amb. 191 (1753).

(*k*) 16 O. R. 422 (1888), *Macmahon*, J.

tation of her husband's will. "The plaintiff cannot now elect to take her interest in her husband's undisposed-of real estate under The Devolution of Estates Act, R. S. O. c. 108, s. 4, as her election must be by deed attested, as provided by section 4, sub-section 2; and as such election was not made it is now too late. As urged by Mr. W. R. Meredith, the widow has, by bringing the action, made her election."

The conclusion to be drawn from the above decision, is that the widow's election to take her dower may be evidenced in any way; but that her election to take her share under the present section must be evidenced strictly as provided in said section.

*Election by will*:—B. I. died the 15th day of June, 1889, his widow died the following 31st day of August, having made a will, dated 28th day of August, 1889, with this clause, "I elect to take a distributive share of my deceased husband's real estate in lieu of dower therein." Robertson, J.:—"There is no doubt that for some purposes the date of the will can be looked to for the purpose of ascertaining, for instance, the intention of the testatrix; and that being the case, it is clear that three days before the death of the testatrix, she intended to elect to take a distributive share in the real estate of her deceased husband, and as the will was duly executed as a will, it follows that it must be construed as an instrument within the said fourth section, duly executed according to the requirements of that section" (l).

*Election before the Devolution of Estates Act*:—A widow might be required to elect between her dower and a distributive share even before The Devolution of Estates Act (m).

(l) *Re Ingoldsby*, 19 O. R. 283 (1890).

(m) *E.g. See Re Quimby*, 5 O. R. 733 (1884), *Boyd, C.*, following *Re Ranking's Trusts*, L. R. 6 Eq. 601, *McGregor v. McGregor*, 20 Gr. 451, and followed in *Amsden v. Kyle*, 9 O. R. 439.

(n) *R*  
(o) *Ca*  
Proctor 1  
(p) *Ch*

*Amount of widow's share under section 4:*—The Statute 22 & 23 Car. II. c. 10, provides (s. 3) for the following distribution:—One third part to the wife of the intestate, and the residue to the children (or their representatives). And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate.

Accordingly, where there are children, and the widow elects to take her share under this section, she takes a third in the realty as in the personalty; and takes it not for life but absolutely out and out (*n*).

Where an intestate leaves a widow and no next of kin, one-half of the personal estate goes to the Crown, the widow taking only the other half (*o*).

A widow, as such, cannot take under a limitation (in a will, etc.) to the next of kin of her husband, according to the Statute of Distributions (*p*).

(3) Any husband who, if sections 3 to 9 of this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may by deed or instrument in writing executed within six months after his wife's death, and attested by at least one witness, elect to take such interest in the real and personal property of his deceased wife as he would have taken if the said sections of this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if the said sections had not passed, and he shall be entitled to no further interest under the said sections of this Act.

Saving as to husband's interest in property of wife.

The extent to which an estate by the curtesy may still exist has been discussed in the notes to R. S. O. 1887, c. 104, s. 5 *supra*.

Where the husband does not elect, within the time and in the mode prescribed by the present section, to take his estate by the curtesy, his rights will be determined by section 5 *infra*.

(*n*) *Re Reddan*, 12 O. R. 781 (1886).

(*o*) *Cave v. Roberts*, 8 Sim. 214 (1836); see *Coombs v. Her Majesty's Proctor*, 16 Jur. 820 (1852).

(*p*) *Cholmondeley v. Ashburton*, 6 Beav. 86 (1843).



"*Would be entitled to an interest*":—These words suggest the question whether the husband, having elected to take the estate by the curtesy and it having been found that he was not in reality *entitled* to such an estate, could then claim his interest under section 5 *infra*.

*Distribution after husband's death*:—Where the husband has until his death enjoyed a tenancy by the curtesy; the property will then devolve according to the Act, not upon the heir-at-law, but upon the next of kin (*q*).

Adminis-  
trators to  
give  
security.

(4) Where any person applies to be appointed an administrator, and the administration applied for is a general administration, the application and the affidavit in support thereof shall shew the particulars of the real estate of the deceased; and the value or probable value thereof, and the amount of the security to be given, shall have reference to such value as well as to the value of the other estate of the deceased. 49 V. c. 22, s. 4 (1-4).

*Security by the administrator*:—The Surrogate Courts Act, R. S. O. 1887, c. 50, contains the following sections:—

Repeal of  
certain  
provisions  
requiring  
sureties to  
adminis-  
trator.  
21 H. VIII.  
c. 5, 22-3  
Car. II.  
c. 10; 1 Jas.  
II. c. 17.

Persons  
receiving  
grants of  
administra-  
tion to give  
bonds, etc.

63. So much of the Act passed in the 21st year of King Henry the Eighth, and chaptered 5, and of the Act passed in the 22nd and 23rd years of King Charles the Second, and chaptered 10, and of the Act passed in the first year of King James the Second, and chaptered 17, as requires any surety, bond or other security to be taken from a person to whom administration may be committed, shall not extend to or be in force in Ontario. R. S. O. 1877, c. 46, s. 60.

64. Except where otherwise provided by law, every person to whom a grant of administration is committed shall give a bond to the Judge of the Surrogate Court from which the grant is made to enure for the benefit of the Judge of the Court for the time being (or in case of the separation of counties, to enure for the benefit of any Judge of a Surrogate Court to be named by the High Court, for that purpose), with one or more surety or sureties as may be required by the Judge of such Surrogate Court, conditioned for the due collecting, getting in and administering the real and personal estate of the deceased, and the bond

(*q*) See *Plomley v. Shepherd*, L. R. 1891, A. C. 244, case on New South Wales Act.

It w  
has been  
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H. R. P.

shall be in the form prescribed by the rules and orders now in force or hereafter made under this Act; and in cases not provided for by such rules and orders, the bond shall be in such form as the Judge of the Surrogate Court may by special order direct. R. S. O. 1877, c. 46, s. 61; 49 V. c. 22, s. 4 (5).

65. Subject to the provisions of section 55 of this Act, the bond shall be in a penalty of double the amount under which the real and personal estate and effects of the deceased have been sworn, unless the Judge thinks fit to direct (as he may do) that the same shall be reduced, and the Judge may also direct that more bonds than one may be given, so as to limit the liability of any surety to such amount as the Judge thinks reasonable. R. S. O. 1877, c. 46, s. 62; 49 V. c. 22, s. 4 (5).

Penalty in bonds, etc., and as to dividing liabilities of sureties.

66. The Judge of every Surrogate Court, on application made on motion or petition in a summary way, and on being satisfied that the condition of the bond has been broken, may order the Registrar of the Court to assign the same to some person to be named in the order, and such person, his executors or administrators shall thereupon be entitled to sue on the said bond in his own name, as if the same had been originally given to him, instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the bond; and all bonds heretofore given or taken in any Surrogate Court, and now in force, may in like manner be assigned under the authority of the Judge of a Surrogate Court, and the assignee shall be entitled to sue and recover thereon in his own name, and the same may be enforced in the same way and to the same extent as bonds given under this Act. R. S. O. 1877, c. 46, s. 63.

Power of Surrogate Courts as to assignment of bonds.

It will be noticed that the 5th section of 49 V. c. 22, has been incorporated in these sections.

*Security for succession duty*.—Besides the above provisions in the Surrogate Act which are intended to secure other creditors, the Crown, which has lately been made a creditor of the wealthy deceased, is secured by the following section, 55 V. c. 6, s. 5.

5. An executor or administrator applying for letters probate or letters of administration to the estate of a deceased person shall, before the issue of letters probate or administration to him, make and file with the Surrogate Registrar a full, true and correct statement under oath

Executors, etc., to file inventory, and bonds for payment of duty.

showing (a) a full itemized inventory of all the property of the deceased person and the market value thereof. (b) The several persons to whom the same will pass under the will or intestacy and the degree of relationship, if any, in which they stand to the deceased; and the executor or administrator shall before the issue of letters probate or letters of administration deliver to the Surrogate Registrar a bond in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable to succession duty, executed by himself and two sureties, to be approved by the Registrar, conditioned for the due payment to Her Majesty of any duty to which the property coming to the hands of such executor or administrator of the deceased may be found liable.

(2) This section does not apply to estates in respect of which no succession duty is payable.

Distribution of property of married woman dying intestate.

5. The real and personal property of a married woman in respect of which she has died intestate, shall be distributed as follows: one-third to her husband if she leave issue, and one-half if she leave none; and subject thereto, shall go and devolve as if her husband had pre-deceased her. 49 V. c. 22, s. 5.

This section renders more explicit what is contained (as to personal property) in a section of "The Married Woman's Property Act," R. S. O. 1887, c. 132.

Separate personal property of wife dying intestate, how to be distributed.

23. The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and her children as the personal property of a husband dying intestate is to be distributed between his wife and children; and if there be no child or children living at the death of the wife so dying intestate, then such property shall pass and be distributed as if this Act had not passed. 47 V. c. 19, s. 20.

*Distribution under section 23 of chapter 132:—In Askill v. Roach (r), a wife died leaving a husband and two children surviving her. Boyd, C., said:—"These two infants and their father are the persons who would be entitled to one-third each under the Statute of Distributions pertaining to the personal estate of married women*

(r) 5 O. R. 703 (1884).

(s) No  
(t) Vol  
(u) Fe  
302 (1893).  
on this point

who die intestate: R. S. O. c. 125, s. 25 (s); Milne v. Gilbert, 2 DeG. M. & G. 715, and S. C. 5, *ib.* 501."

*Conflict between section 5 and chapter 132, section 23:*—The words "as if this Act had not been passed" in the above section 23, according to the Canada Law Journal (*t*), produce a "legislative riddle." As section 23 is "a survival from the Consolidated Statutes of Upper Canada" the simplest solution of the riddle is to regard it as superseded by section 5, above; and to attribute any discrepancy, as the Journal does, to the revisers of the statutes.

The old state of the law on this branch of the subject was very simple. The husband surviving was entitled to the whole of his deceased wife's personal effects. This was recognized by 29 Car. II. c. 3, s. 24, explaining 22 & 23 Car. II. c. 10. The present section 5 manifestly seeks to produce a strict equality in the methods of distributing the real and personal property of intestates, whether male or female.

*Separate property of wife:*—Formerly where there was no disposition made of the wife's separate property the husband succeeded as next of kin and not by marital right (*u*).

6. When a person shall die without leaving issue and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving; nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister. 49 V. c. 22, s. 6.

Distribution of estate of person dying intestate and without issue.

*Rights of father, mother, et al.:*—The former rule as to personalty was that the father took the whole in preference to the mother or brothers and sisters; if the father was

(s) Now R. S. O. 1887, c. 132, s. 23, the text of which is given above.

(t) Volume 29, p. 467.

(u) Fettiplace v. Gorges, 1 Ves. 49 (1789); cf. Carey v. Taylor, 2 Vern. 302 (1693). See Lamb v. Cleveland, 19 S. C. R. 78, as to law of New Brunswick on this point.

dead the mother, brothers and sisters took in equal shares (*v*). The former rule as to realty in Ontario is contained in sections 31 and 35 *infra*.

Application of property in payment of debts.

7. The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values to the payment of his debts. 49 V. c. 22, s. 7.

The former rule in Ontario, and that now in force in England, is the rule laid down in *Re Bate, Bate v. Bate* (*w*), where it was held that the whole of the personal estate not specifically bequeathed, not excepting pecuniary legacies, must be applied in payment of debts before the real estate can be resorted to.

"Specific legacies and real estate devised, whether in terms specific or residuary, are liable to contribute pro rata" (*x*).

The effect of the present section is to level the distinction between real and personal property left in a residuary devise or bequest.

*Mortgaged land devised*:—"According to R. S. O. 1887, c. 109, s. 37, the land mortgaged is primarily liable to pay its own burdens; and according to section 38, if a testator wishes to vary this rule, it must be by a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them (*y*). Such a direction is not to be gathered from the fact that he directs his debts to be paid out of a mixed fund (*z*). The Devolution of Estates Act is to be read in conjunction with the sections above cited from the R. S. O. 1887, c. 109. And

(*v*) See Williams on Personal Property, 10th Ed. 404; also 1 Jac. II. c. 17, s. 7.

(*w*) 43 Chy. D. 600 (1890). See Jarman on Wills, 5th Ed. 1430.

(*x*) Jarman, 1431.

(*y*) Nelson v. Page, L. R. 7 Eq. 25 (1868).

(*z*) Elliott v. Dearsly, 16 Ch. D. 322 (1880); *Re Smith*, 33 Ch. D. 198 (1886); *Re Newmarch*, Newmarch v. Storr, 9 Ch. D. 12 (1878).

(a) Bay  
(b) 14  
(c) C. F.  
sued on behalf  
trustees or  
interested parties in the  
proceedings, or  
addition to  
Rule 93.

in that view, I do not think that the words used in the 4th and 7th sections relating to 'the payment of debts,' apply to the payment of such debts as are charged on land, and by the terms of the R. S. O. are payable thereout as the primary fund " (a).

8. (1) Where infants are concerned in real estate which but for the preceding sections of this Act would not devolve on executors or administrators, no sale or conveyance shall be valid under this Act without the written consent or approval of the Official Guardian of infants, appointed under *The Judicature Act*, or in the absence of such consent or approval without an order of the High Court.

Sales of infants' estate.

Rev. Stat. c. 44.

(2) The High Court may appoint the Local Judge of any county, or the Local Master therein, as Local Guardian of Infants in such county during the pleasure of the Court, with authority to give such written consent or approval as aforesaid, instead of the Official Guardian; and the Official Guardian and Local Guardian shall be subject to such general orders as the High Court may from time to time make in regard to their authority and duty under this Act. 49 V. c. 22, s. 8.

Local Guardians in outer counties.

*Foreclosure proceedings where infants are beneficiaries*:—In *Keen v. Codd* (b), it was contended that under the present section (8) and Rule 309 (c) the personal representative of the mortgagor (deceased) was the only necessary defendant to a mortgage action. This, however, was not the view of Boyd, C., who said:—"Before the Devolution of Estates Act, upon a mortgagor dying intestate proceedings to foreclose must have been against the heir-at-law. If this heir was an infant the invariable course of the Court was to have it ascertained whether a sale or foreclosure would be more for the benefit of the defendant. But

(a) Boyd, C., in *Mason v. Mason*, 13 O. R. 725 (1887).

(b) 14 P. R. 182 (1891).

(c) C. R. 309:—Trustees, executors and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to, or in lieu of, the previously existing parties thereto. J. A. Rule 95.

since the Devolution Act, it is said that the action can now be maintained against the general administrator under that Act, and that the representative should be sole defendant by virtue of Con. Rule 309. I do not read the statute and rule as working such a change in the case of infant beneficiaries in a foreclosure action. The Act is so drawn as to protect the rights of infants in case of a sale and conveyance of property out of Court, by having the supervision of the official guardian as by section 8 is provided (*see* also Rule 1005 (*d*)). This Rule of Court was passed chiefly to avoid the expense of serving many parties, but where infants interested in an estate are as a group represented by the official guardian (Con. Rule 258) it is better that he should intervene at the outset of the proceedings than at a later stage. In the present case there is a difference of interest between the widow, who is administratrix, in respect of her dower and the children. She has also consented to an immediate sale; it may be that the usual period for redemption would be a more desirable thing in the interest of the infants. These and other questions are likely to arise in mortgage actions, so that as a rule, the infants should be made parties under our system of procedure, in the first instance—a practice which has obtained hitherto—instead of any innovation being introduced as a result of the Devolution of Estates Act."

*Duty of official guardian*:—In *Re Reddan* (*e*), the official guardian declined to give his consent to a sale of the real estate without the approval of the Court, in order that the quantum of interest taken by the widow under the Act might be determined. Boyd, C.;—"So far as the infants and the lunatic are concerned, it will be right to

(*d*) C. R. 1005 :—Before an executor or administrator takes proceedings under The Devolution of Estates Act for the sale of real estate in which infants are concerned, he shall give to the official guardian or other officer charged with the duties referred to in the 8th section of the said Act notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice.

(*e*) 12 O. R. 781 (1886).

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present a scheme showing how it is proposed to deal with and divide the property in order that the Judge may see to the protection of their interests; this is also the duty devolving upon the official guardian under section 8 of the Act. When the sale of land in which infants are interested is proposed by the executors, it is competent for that officer to see that the minors' shares are or will be properly invested and protected. In case of doubt, the matter can always be referred to the Court, and thereby proper measures taken to secure the proceeds by payment into Court, or otherwise. My brother Ferguson concurs in the general results herein directed, and refers me to *Mitchell v. Richie*, 13 Gr. 445, 451, as to the care to be exercised over infants' money. This is a proper case to allow all costs out of the estate."

"Which but for the preceding sections of this Act would not devolve":—In *Re Booth's Trusts* (f), the will devised lands to the executors on trust to sell the same, and the question arose whether the approval of the official guardian was necessary. Ferguson, J.—"Then the eighth section of the Act says that where infants are concerned in real estate which, but for the preceding sections of the Act, would not 'devolve' upon executors or administrators, no sale or conveyance shall be valid under the Act without the written consent or approval of the official guardian of infants appointed under the Judicature Act, or in the absence of such consent or approval, without an order of the High Court. The difficulty I have is in respect to the words in this section, 'which but for the preceding sections of this Act would not devolve on executors or administrators.' By these words it seems to have been assumed that there are cases or instances in which, apart from the preceding sections referred to, the estate might or would 'devolve on' executors or administrators, which, according

to the strict meaning of the word 'devolve,' could not, I think, leaving some peculiar estates out of consideration, be the case unless the executor or administrator happened to be heir-at-law (and even in such case he would not take as executor or administrator), because the executor or administrator as such before the Act took, and now, apart from the provisions of the Act, takes no estate or interest in the lands of the testator or intestate. As to the lands, nothing fell upon him by succession. As to these, he could not, in his capacity of executor or administrator, be a successor or take by succession. Hence the estate could not devolve upon him according to the strict meaning of the word 'devolve.' By these considerations I am led to the conviction that the Legislature did not use or intend to use this word 'devolve' in the second line of the eighth section according to its strict and accepted meaning, but according to a meaning that is found in some of the authorities, namely, 'to pass to another,' and that what is really meant by this part of the eighth section is, that where infants are concerned in real estate which but for the preceding sections referred to would not come to the executor or administrator by a devise, gift or otherwise, no sale or conveyance should be valid under the Act without the written consent, etc., and that this eighth section has no application to a case such as the present one, in which the estate, but for the provisions of the Act, would be vested in the executors by the will, which also gives them the power to sell the same; and for these reasons I am of opinion that the consent in writing of the guardian mentioned in the eighth section is not, in the present case, necessary to validate a sale and conveyance of the lands by the executors."

Power of  
personal  
representa-  
tive over real  
property.

9. Subject as hereinbefore provided, the legal personal representatives from time to time of a deceased person shall have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act,

(g) 20 O.  
19 O. R. 705.  
(h) 24 O.

with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were personal property vested in them. 49 V. c. 22, s. 9.

*Powers of representatives ; Conveyance of wife's lands by husband :—*In *Re Wilson and Toronto Incandescent Electric Light Co. (g)*, land had been conveyed in 1874 to a husband and wife, who were married in 1864. It was held that they took like strangers, not by entireties, but as tenants in common ; and also that the husband could, by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, *although there were no debts of the wife to pay*.

A somewhat similar case is *Tenute v. Walsh (h)*, where the husband agreed to exchange for other lands, the lands of his deceased wife, and was sued for specific performance. Ferguson, J., after setting forth section nine of the Devolution of Estates Act, says :

"After the passing of that Act, and before the passing of 54 V. c. 18 (O.), it was held that the personal representative could not, as such representative merely, sell lands that had devolved upon him under the provisions of the statute, unless there was need of his doing so for the purpose of paying debts, etc., in the course of administration. See *In re Mallandine*, 10 C. L. T. Occ. N. 226. The attempted exchange in the present case was not in any sense an act done, or attempted to be done, in the course of administration of the estate.

"There cannot be, I think, in the personal representative any greater power to exchange than there is to sell the real estate ; and section 2 of chapter 18, 54 V., above referred to, which is, I think, to be considered an enabling

(g) 20 O. R. 397 (1891), Falconbridge, J., distinguishing *Martin v. Magee*, 19 O. R. 705.

(h) 24 O. R. 309 (1893).

statute, seems to me to indicate the purposes for which the personal representative may sell the lands.

"It was not shown whether or not there are in the present case debts of the testatrix. But it seems clear that the purpose of this exchange could not have been the payment of debts or of making a distribution amongst the persons beneficially entitled, and, besides, it was proved before me in a general way that "the heirs" objected to the exchange being carried into effect, and it did not appear that the official guardian had been consulted.

"I am not of the opinion that the personal representative can properly make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own; and, if there were no reasons other than those above alluded to, I should be of the opinion that this action for specific performance could not succeed.

"I do not see that in taking this view I am going contrary to anything laid down in *Martin v. Magee*, 18 A. R. 384, or *Scott v. Supple*, 23 O. R. 393, or in *Re Wilson*, 20 O. R. 397. In the last-mentioned of these cases, my brother Falconbridge says, at page 403; 'I do not say how it might be if the administrator, having no other interest, were arbitrarily endeavouring to sell against the wishes of the heirs, and without reason or necessity for selling, such as the existence of debts.'"

*Can executor of deceased lessor renew lease of freehold?*

—"By section 9 of 'The Devolution of Estates Act,' power given to the legal personal representative to dispose of and otherwise deal with all real property vested in him under the provisions of the Act with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were personal property vested in him.

"If the property were leasehold instead of freehold, a legal personal representative might always have disposed of

it absolutely, or by way of underlease, and have made a good title even against a specific legatee, unless the disposition was fraudulent: *see* Williams on Executors, 7th ed., pp. 939 *et seq.*: by section 9 of the Act, he has now the like power to renew a lease of real property.

"If the renewal of the lease would be in violation of the rights of anyone beneficially entitled to the property, doubtless the Court would prevent any such breach of trust, and would set aside the lease if taken with notice of the breach of trust, which with the trustees' liability to account, is the protection that the beneficiaries have.

"In my opinion, the question whether the executor has power to grant the renewal of the lease must be answered in the affirmative" (*hh*).

10. In the case of a person dying after the 1st day of July, 1886, his personal representative for the time being shall, in the interpretation of any Statute of this Province, or in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his heirs and assigns, unless a contrary intention appears. 50 V. c. 7, s. 35. Personal representatives to be deemed in law heirs and assigns.

"*Heirs and assigns*":—These words occur either alone or in conjunction with other words in a number of places in the Statutes:—In chapter 105, *supra*, in clauses 1, 3, 5, 6, 7, 8 and 9, in column 2, schedule B; in chapter 106, *supra*, in schedule A, and in clauses 1 and 10 in schedule B; in chapter 107 in schedule A, and in most of the clauses of schedule B.

As for instruments, the words heirs and assigns occur in most of the ordinary printed forms of deeds and mortgages.

We may here insert the two amending Acts referred to in the introductory note to the present chapter:—

(*hh*) Meredith, J., in *Re C. P. R. Co. v. National Club*, 24 O. R. 205 (1893).

## 54 VIC. CAP. 18.

## An Act respecting the Sale of Real Estate by Executors and Administrators.

[Assented to 4th May, 1891.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Real estate not disposed of within a year to vest in heirs unless caution registered.

Rev. Stat.  
c. 116.

Form of  
caution.

Rev. Stat.  
c. 114.

Caution  
only to affect  
lands  
specified.

With-  
drawal of  
caution.

1. (1) Real estate not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, at the expiration of the said period, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs, (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the registry office or land titles office where the land is, under *The Land Titles Act*, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered.

(2) The caution may be in the form or to the effect following :—We (A. B. and C. D.,) executors of (or administrators with the will annexed of, or administrators of) \_\_\_\_\_, who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, do hereby certify that it may be necessary for us under our powers and in fulfilment of our duties as executors (or administrators) to sell the real estate of the said \_\_\_\_\_, or part thereof (or the caution may specify any particular parts or parcels), and of this all persons concerned are hereby required to take notice. And the execution of the said caution shall be verified by the affidavit of a subscribing witness in manner prescribed by *The Registry Act*.

(3) In case the caution specifies the tracts or parcels which the executors or administrators may have occasion to sell; the caution shall be effectual as to those tracts or parcels only.

(4) The executors or administrators before the expiration of the twelve months may file a certificate withdrawing the caution mentioned in the preceding sub-sections; or

withdrawing the same as to any parcel of land specified in such certificate and such certificate of withdrawal may be to the effect following: We \_\_\_\_\_ executors (or administrators) of \_\_\_\_\_ do hereby withdraw the caution heretofore registered with respect to the real estate of the said \_\_\_\_\_, (or as the case may be).

(5) This certificate of withdrawal shall be verified by an affidavit which may be in the form following:—I, G.H., etc., make oath and say: I am well acquainted with \_\_\_\_\_, named in the above certificate; I believe that the signatures purporting to be their signatures at the foot of the said certificate are in their hand-writing respectively; I believe the said \_\_\_\_\_ to be the persons who registered the caution referred to in the said certificate.

Certificate of withdrawal to be verified on oath.

2. (1) Executors and administrators in whom the real estate of a deceased person is vested under The Devolution of Estates Act, 1886, or the 4th section of the Revised Statute respecting the devolution of estates shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, and there are no debts no such sale shall be valid as respects such infants, lunatics, or nonconcurring heirs or devisees, unless the sale is made with the approval of the official guardian appointed under The Judicature Act; and for this purpose the official guardian aforesaid shall have the same powers and duties as he has in the case of infants.

Executors, etc., to have same powers as to disposition of lands as in the case of personalty.

Rev. Stat. c. 44.

(2) This section shall not apply to an administrator where the letters of administration are limited to the personal estate, exclusive of the real estate, and shall not derogate from any right possessed by an executor or administrator independently of The Devolution of Estates Act, 1886, or the fourth section of the Revised Statute respecting the devolution of estates.

Application of section.

49 V. c. 22, Rev. Stat. c. 108.

3. (1) Past sales of such real estate as aforesaid made by executors and administrators with the written consent or approval of the official guardian, as required by the 8th section of The Devolution of Estates Act, shall be deemed valid by reason of this Act, and are hereby confirmed as respects all the heirs and devisees, whether infants or of full age, though there were no debts of the deceased to be paid out of the proceeds.

Past sales approved by official guardian confirmed.



Other cases of past sales.

Past sales valid unless questioned within one year.

Where past sale has been subject of action.

Persons accepting share of purchase money to be bound by sale.

*Bona fide* purchasers of estate to hold same free from debts.

*Bona fide* purchasers of estate from devisee to hold same free from debts.

(2) The approval of the official guardian to be expressed in writing under his hand shall be sufficient to confirm and render valid, as respects all the heirs and devisees though there were no debts of the deceased to be paid out of the proceeds, any past sale in any case in which the value of the infant's share is under \$50.

(3) Past sales of such real estate as aforesaid made by executors and administrators in other cases shall be adjudicated upon according to equity and good conscience in view of all the circumstances, every sale which has been made in good faith and for a fair consideration shall be held valid.

(4) Every sale heretofore made shall be valid unless questioned in an action within one year from the passing of this Act, except in any case where under The Devolution of Estates Act the approval of the official guardian was required and was not obtained.

(5) In case any past sale is now, or heretofore has been, the subject of an action, and relief is given to either party under this Act, the party obtaining such relief shall pay the cost of the action.

4. Where before this Act there has been a sale by executors or administrators, no infant being concerned and no consent or approval of the official guardian having been obtained, but the person, or one of the persons, beneficially entitled, has received and accepted, or shall hereafter receive and accept his share or supposed share of the purchase money, such acceptance shall be deemed a confirmation of the sale as respects such person.

5. Persons *bona fide* purchasing real estate from the executors or administrators of a deceased owner in manner authorized by The Devolution of Estates Act or this Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner not specifically charged thereon otherwise than by his will, and from all claims of his devisees and heirs-at-law as such, and the purchasers shall not be bound to see to the application of the purchase money.

6. Persons *bona fide* purchasing real estate from a devisee whose devise has been assented to by the executors or administrators by deed, or by writing under their hand, or *bona fide* purchasing the real estate from any heir-at-law or devisee to whom the same has been conveyed by the executors or administrators shall be entitled to hold the same freed and discharged from any unsatisfied debts

and liabilities of the deceased owner not specifically charged thereon otherwise than by his will; but nothing herein contained shall lessen or alter the rights of creditors as against the executors or administrators personally, or the rights of creditors as against any devisee, heir-at-law or next of kin in whom real estate of a deceased debtor has been vested by the executors or administrators or permitted to become vested, to the prejudice of such creditors.

Proviso.

7. (1) The official guardian shall have power with the approval of the Lieutenant-Governor in Council, or of the Judges of the High Court of Justice, to frame rules regulating the practice and procedure to be followed in all proceedings under The Devolution of Estates Act or this Act, in which the privity or consent of such official guardian shall be required; and also to frame a tariff of the fees to be allowed and paid to solicitors for services rendered in such proceedings. Such rules and tariffs when approved as aforesaid shall be published in the *Ontario Gazette*, and shall thereupon have the force of law; and the same shall be laid before the Legislative Assembly at the next session after promulgation thereof.

Rules of procedure under Rev. Stat. c. 108.

(2) In case the Lieutenant-Governor sees occasion in consequence of the illness or absence of the official guardian or for any other cause, he may appoint a person to act as the deputy *pro tem.* of the official guardian for the purposes of The Devolution of Estate Act and this Act; and a deputy appointed by the Lieutenant-Governor shall have all the powers of the official guardian as respects the said purposes.

Appointment of deputy official guardian *pro tem.*

(3) Affidavits may be used in proceedings taken in pursuance of the said Act or of this Act; and such affidavits may be sworn before any commissioner for taking affidavits or before a notary public.

Affidavits.

#### 56 VIC. CAP. 20.

An Act respecting the time for the Vesting of Estates in Heirs and Devisees.

[Assented to 27th May, 1893.]

Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Registration of caution after twelve months from death of testator.  
54 V. c. 18.

Proviso.

Effect of registration.

Period for vesting of estates in

1. Where executors or administrators have, through oversight or otherwise, omitted to register a caution within twelve months after the death of the testator, or intestate, as provided by the first section of the Act intituled, *An Act respecting the sale of Real Estate by executors and administrators*, or have omitted to re-register a caution as required by the said statute, they may register the Caution in either case notwithstanding the lapse of the twelve months respectively provided for the said purposes :—

Provided they register therewith (1) the affidavit of verification therein mentioned ; and

(2) A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be,) under their powers and in fulfilment of their duties in that behalf ;

(3) The consent in writing of any adult devisees or heirs whose property or interest would be affected ; and

(4) An affidavit verifying such consent ; or

(5) In the absence and in lieu of such consent, an order signed by a high court judge or county court judge, or the certificate of the official guardian approving of and authorizing the caution to be registered, which order or certificate the judge or official guardian is to make with or without notice, and on such evidence as may satisfy him of the propriety of permitting the caution to be registered ; and the order to be registered shall not require verification, and shall not be rendered null by any defect or supposed defect of form or otherwise.

2. In case of such caution being registered or re-registered in due time under the authority of the preceding section such caution shall have the same effect as a caution registered within twelve months from the death of the testator or intestate, save as regard persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them ; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators.

3. To remove doubts, it is hereby declared that according to the true intent and meaning of the said Act the period of estates becoming vested in devisees or

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heirs without conveyance was not to be, and is not, devisees or heirs not extended. delayed or postponed beyond the said twelve months by reason of probate not having been taken of the will of the testator or letters of administration to the estate of an intestate; and that it is not, and shall not be, necessary in order to such vesting that probate or letters of administration shall have been obtained.

4. This Act applies to the estates of persons dying before or after the passing of the said Act or this Act. Application of Act.

*Effect of the Acts of 54 & 56 Vict.*:—The recent decision in *Re McMillan* (i) contains some valuable criticism on these Acts: it may therefore be excusable to give it in full:—

"October 11th, 1893. Boyd, C.:—

"Testator dies 17th October, 1891, devising land in question to his son Donald, who is to pay all debts of the testator. Devisee mortgages land to McLaurin & Co., on 23rd May, 1892, for \$1,200, duly registered forthwith.

"Executors named in the will, renounced 'many months, after the death,' and on 28th September, 1892, letters of administration *cum test.* were granted to the plaintiff, Duncan J. McMillan. On 8th December, 1892, administration order granted; 18th February, 1893, the mortgagees were brought in by notice T., as subsequent incumbrancers. They now move against this order as inapplicable to them.

"The application depends upon the meaning and effect of the Devolution of Estates' Act and its amendments, R. S. O. c. 108.

"By section 4, land, notwithstanding testamentary disposition, devolves upon the legal personal representatives, subject to the payment of debts.

"By 54 V. c. 18, s. 1 (O.), land not disposed of or conveyed by the executors within twelve months after the death of the testator, shall, at the expiration of the said

(i) 24 O. R. 181 (1893).

period, be deemed thenceforward to be vested in the devisees beneficially entitled thereto as such devisees (or their assigns, as the case may be), without any conveyance by the executors, unless the executors cause a caution to be registered against the lands, setting forth that it is or may be necessary for them to sell the lands under their powers and in fulfilment of their duties in that behalf. In this case no such caution was registered.

"Section 6 of the Act of 1891, provides that nothing contained in the Act shall lessen the rights of creditors as against any devisee in whom real estate of a deceased debtor has been vested by the executors, or permitted to become vested to the prejudice of such creditors.

"The Act of 1893, 56 V. c. 20 (O.), provides for registration of the caution after twelve months from the testator's death; and section 2 declares that the subsequent registration shall have the same effect as if registered within the year, save as regards persons who, in the meantime may have acquired rights for valuable consideration from or through the devisees.

"Section 3 of this last Act declares that the period of estates becoming vested in devisees without conveyance, was not to be delayed beyond the twelve months by reason of probate not having been taken of the will, and that it is not necessary in order to such vesting that probate should have been obtained. These are all the material clauses.

"In the result it appears to me that twelve months after the death of the testator, no probate having issued and no caution being registered, the whole estate in the land became vested by operation of the law in the devisee (or his assigns).

"That is, on the 17th October, 1892, the right of the personal representatives ceased, whether the devisee had or had not conveyed or dealt with the land. The only

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question is, could he assume to mortgage the estate during the twelve months, as here on the 23rd May, 1892? It is argued that the mortgage was utterly void, but I cannot accept this as the true view.

"The Act of 1891, by speaking of 'assigns,' appears to recognize a transmission of interest pending the year by the original devisee, and I see no good reason against holding that the mortgage was perfectly operative as between the devisee and the applicants when it was made. It became fully operative as to the land and as against the personal representatives of the testator when the year expired, in the absence of any warning that the land was needed for their purposes. I am dealing only with the externals of the transaction, i.e., assuming *bona fides*, good consideration, and generally fair dealing on the part of the mortgagee. If these are to be questioned, it is not by bringing the ostensibly prior incumbrancers into the Master's office pending administration, but by plenary action attacking the security.

"The applicants should succeed; be discharged from the administration proceedings and have costs of application."

"*Personal representative of mortgagor, after lapse of year:—Ramus v. Dow (j)*, a mortgage action against the surviving husband and infant children of the mortgagor who died intestate in February, 1892, was begun before the lapse of a year from the death. It was held that the plaintiff was entitled, after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the Court, no administrator having been appointed, and no caution registered under 54 V. c. 18, s. 1.

*Acts of 54 & 56 V., how far retrospective:—*"These amendments have been held not to apply to the estates of

(j) 15 P. R. 219 (1893).

persons dying prior to May 4th, 1891. *See Re Ferguson, per Meredith, J., June 16th, 1891; Re Baird, per Boyd, C., June 19th, 1893* (k).

Interpretation.

11. The words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning, shall, where they occur in the next fifteen sections, numbered from 12 to 26 inclusive, except where the nature of the provision or the context thereof excludes such construction, be interpreted as follows, that is to say :

"Land."

(1) "Land" shall extend to messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them are in possession, reversion, remainder or contingency ;

"Purchaser."

(2) "The purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any partition, by the effect of which the land becomes part of or descendible in the same manner as other land acquired by descent ;

"Descent,"

(3) "Descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir is an ancestor or collateral relation, as where he is a child or other issue.

"Descendants of any ancestor."

(4) "Descendants of any ancestor" shall extend to all persons who must trace their descent through such ancestor.

"Person last entitled to land."

(5) "The person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof ;

"Assurance."

(6) "Assurance" shall mean any deed or instrument (other than a will), by which any land may be conveyed or transferred at law or in equity ;

"Rent."

(7) "Rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land ; and

"Person through whom an

(8) "Person through whom another person is said to claim" shall mean any person by, through or under, or by the act of whom the person so claiming, becomes entitled to the estate or



interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise. R. S. O. 1877, c. 105, s. 2.

other person is said to claim."

#### DESCENTS BEFORE 1ST JULY, 1834.

12. This Act shall not extend to any descent which took place on the death of any person who died before the first day of July, 1834. R. S. O. 1877, c. 105, s. 3.

Descents before July 1, 1834, to be as at Common Law.

The first day of July, 1834, was the date fixed by 4 Wm. IV. c. 1 (U. C.), s. 11. The Imperial Act 3 & 4 Wm. IV. c. 106, took effect 1st day of January, 1834.

#### DESCENTS SINCE 1ST JULY, 1834.

13. The seven next sections of this Act, numbered from 14 to 20 inclusive, shall not have operation retrospectively to a period of time anterior to the sixth day of March, 1834, so as, by force of any of their provisions, to render any title valid, which in regard to any particular estate had, prior to that day, been adjudged or has been or may be in any suit which was depending on that day, adjudged invalid on account of any defect, imperfection, matter or thing which is by such sections altered, supplied or remedied; but in every such case the law in regard to any such defect, imperfection, matter or thing, shall, as applied to such title, be deemed and taken to be as if those sections of this Act had not been passed. R. S. O. 1877, c. 105, s. 4.

The next seven sections not to operate retrospectively in certain cases.

6th day of March, 1834, is date of passing of 4 Wm. IV. c. 1 (U. C.).

*Equitable estates*:—Equitable estates descend according to the same rule as legal estates (l).

14. In every case on and after the first day of July, 1834, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require, the person last entitled to the land shall for the purposes of this Act be considered to have been the purchaser thereof, unless it is proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it is proved that he inherited the same

Descent shall always be traced from the purchaser, etc.

Imp. Act, 3-4 Wm. IV. c. 106, s. 2.

(l) See *Trash v. Wood*, 4 My. & C. 324 (1839), and cases there cited.

and, in like manner, the last person from whom the land is proved to have been inherited shall in every case be considered to have been the purchaser, unless it is proved that he inherited the same. R. S. O. 1877, c. 105, s. 5.

*Descent from the last purchaser*:—"By the law before the statute of inheritance (*m*), in matters which were capable of seisin, it was always traced back to the person last seised; but in estates incapable of seisin, such as remainders and reversions it was traced back to the last purchaser . . . . This rule of descent is not confined to contingent interests; for vested interests in remainder and reversion are exactly in the same situation . . . .

"How does the matter stand under the new statute? The statute of the 3rd or 4th Wm. IV., c. 106, lays down this: the law was different on the subject as I have already said, in those cases in which there was a seisin of property, and in those cases in which there was no seisin, and it was considered very desirable to assimilate the law on that subject, and, accordingly the new statute has altered the law of inheritance in this respect, and has endeavoured to assimilate the law, both with regard to matters capable of seisin and the law as applied to matters incapable of seisin. Accordingly it enacts, that if an estate in possession descend on the heir of a purchaser, and he does not deal with it in any manner whatsoever, and then dies intestate, it will descend not upon his heir, but upon the heir of the purchaser. That is what the statute has enacted" (*n*).

*Son claiming descent from illegitimate father*:—"A flaw in the present section was discovered in a case of this character (*o*). The flaw was afterwards repaired in England by 22 & 23 V. c. 35, ss. 19 & 20.

*Vendor relying on statutory presumption of purchase*:—"A vendor making a title as heir was not bound to pro-

(*m*) 3 & 4 Wm. IV. c. 106 (Imp.).

(*n*) Sir John Romilly, M.R., in *Ingilby v. Amcotts*, 21 Beav. 585 (1856).

(*o*) *Doe d. Blackburn*, 1 Mood. & Rob. 547 (1836).

duce affirmative evidence in his possession that the ancestor from whom he traces descent took as a purchaser but may rely on the statutory presumption, until some proof to the contrary is adduced. But he was bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase (*p*).

For further cases see *Blake v. Hynes* (*q*) and cases below.

15. Where land is devised by a testator dying after the first day of July, 1834, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and where any land is limited by any assurance, executed after the said first day of July, 1834, to the person or to the heirs of the person who thereby conveys the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as of his former estate or part thereof. R. S. O. 1877, c. 105, s. 6.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heir shall create an estate by purchase.

Imp. Act, 3-4 Wm. IV. c. 106, s. 3.

Lord St. Leonards says of this section (*r*):—"These are alterations of fundamental rules, for by the old law the heir, whenever it was practicable, took by descent as his better title, and no man could by deed, without departing with the whole estate out of him, raise a fee simple to his own right heirs by that name as purchasers, nor could he by deed at common law make the heirs of his body take by purchase; and although by way of use he could effect the latter object, yet he could not make his heirs general take by purchase, or alter the descent by such a limitation by way of use: to effect that object, it was necessary to

(*p*) *Dorling v. Claydon*, 1 Hem. & M. 402 (1863).

(*q*) L. R. 11 Ir. 284 (1876), compromise of will; *Doe d. Parker v. Thomas*, 3 M. & G. 815 (1842), and *Doe d. Winder v. Lawes*, 7 Ad. & Ell. 213 (1837), purchaser dying before seisin; *Cooper v. France*, 19 L. J. Ch. 315 (1841), and *Patterson v. Mills*, 19 L. J. Ch. 310, succession to coparcener; *Rider v. Wood*, 1 K. & J. 644 (1855), *Richards v. Richards*, Johns. 754 (1860), and *Goodale v. Gawthorne*, 2 Sm. & Giff. 375 (1854), posthumous heir; *Bickley v. Bickley*, L. R. 4 Eq. 216 (1867), meaning of descent.

(*r*) New Stat. on Real Property, 2nd Ed. 259.

depart with the whole estate and to take under a *new conveyance* an estate which would vest in him or his heirs by purchase according to the limitation. The heir now takes so absolutely as devisee, that pecuniary legatees are not entitled to have the assets marshalled as against him" (s).

*Rule in Shelley's Case*:—This important rule lays it down that when the ancestor, by any gift or conveyance takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, *either mediately or immediately*, to his heirs in fee or in tail, the words "the heirs" are words of limitation of the estate of the ancestor (t). In other words according to this rule the heir would take as heir by descent and not as a purchaser.

The present section makes an heir to whom any devise is made take as a purchaser.

*Former rule as to remainders*:—It was an old rule that a man could not by any form of conveyance whatsoever, whether by use or by devise, raise a fee simple to his own right heirs, by the name of heirs, as a *purchase*. Such a limitation to the right heirs would have been a *reversion*, not a *remainder* (u), and the heirs would have taken by *descent* (v).

Where heirs take by purchase under limitations to the heirs of their ancestor the land shall descend, as

16. Where a person acquires land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the first day of July, 1834, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator dying after the said first day of July, 1834, then and in any of such

(s) Citing *Strickland v. Strickland*, 10 Sim. 374 (1839), and *Biederman v. Seymour*, 3 Beav. 368 (1841).

(t) For application of this rule see *Parker v. Clark*, 1 Jur. N. S. 605, 3 Sm. & G. 161 (1855); *Evans v. Evans*, L. R. 1892, 2 Ch. D. 173.

(u) *Godolphin v. Abingdon*, 2 Atk. 57 (1740); citing *Counden v. Clarke*, Hobart 29.

(v) *Wills v. Palmer*, 5 Burr. 2615 (1770); *Read v. Morpeth*, Cro. Eliz. 321; *Cholmondeley v. Clinton*, 2 Jac. & W. 1 (1820); *Locke v. Southwood*, 1 M. & C. 411 (1831).

cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. R. S. O. 1877, c. 105, s. 7.

if the ancestor had been the purchaser.  
Imp. Act.  
3-4 Wm. IV.  
c. 106, s. 4.

The ancestor is here treated as the first purchaser, though he never had any interest in the land.

A gift to the heirs of a person to whom no estate is given is a gift to them as *personæ designatæ* (w).

17. Where the person from whom the descent of any land is to be traced has had any relation who, having been attainted, died before such descent took place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted unless such land escheated in consequence of such attainer before the first day of July, 1834. R. S. O. 1877, c. 105, s. 8.

After the death of a person attainted, his descendants may inherit.  
Imp. Act.  
3-4 Wm. IV.  
c. 106, s. 10.

R. S. O. 1887, c. 95 (An Act respecting Estates and Forfeitures), deals with the right of the Crown to take lands escheated or forfeited "for any cause except crime" (x).

*Attainder abolished*:—The Criminal Code, 1892, provides:—

"965. From and after the passing of this Act no confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se*, shall cause any attainer or corruption of blood, or any forfeiture or escheat; provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. 33-34 V. (U. C.) c. 23, ss. 1, 6 and 5."

18. Proof of entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir, or in any person claiming by or through him. R. S. O. 1877, c. 105, s. 9.

Heir-at-law need not prove entry.

19. Where any assurance executed before the said first day of July, 1834, or the will of any person who died before that day, contains any limitation or gift to the heir or heirs of

Limitations made before 1st July, 1834, to the

(w) *Bernes v. Fellows*, 35 W. R. 350.

(x) See also R. S. O. 1877, c. 59 (Administration by the Crown of Estates of Intestates).

heirs of a person then living, shall take effect as if this Act had not been passed. Imp. Act, 3-4 Wm. IV. c. 106, s. 12.

Grantees, devisees, etc., shall not take as joint tenants unless such intention be expressed.

any person under which the person or persons answering the description of heir is entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been passed shall become entitled by virtue of such limitation or gift, whether the person named as ancestor was or was not living on or after the said first day of July, 1834. R. S. O. 1877, c. 105, s. 10.

20. Where by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants. R. S. O. 1877, c. 105, s. 11.

The characteristic features of the estate of joint tenancy have been already mentioned in a former chapter (*y*). The incident of survivorship which distinguished joint tenancy from tenancy in common has been felt to be unjust; and accordingly the present rule has been enacted, favouring the construction of estates, where the words of limitation are not clear, as tenancies in common, rather than as joint tenancies.

*"Other than executors or trustees":*—The incident of survivorship is a distinct advantage in trust estates, as it enables the surviving trustee to perform the duties of the deceased one, and has not the counterbalancing evil of heaping benefits on the survivor at the expense of the non-survivor.

#### DESCENTS BETWEEN 1ST JULY, 1834, AND 1ST JANUARY, 1851.

Descents between the 1st July, 1834, and 31st December, 1851.

21. As respects every descent between the first day of July, 1834, and the thirty-first day of December, 1851, both days included, and as respects any descent not included or provided for in the sections of this Act numbered from 31 to 57, both included, the following sections, numbered from 22 to 26, both included, shall apply retrospectively to the first day of July, 1834, and also prospectively as the case may be, and shall be construed as if the same had been passed on the said first day of July, 1834. R. S. O. 1877, c. 105, s. 12.

(*y*) See *supra*, c. 100, s. 5.

1st day of July, 1834, was the date fixed for coming into force of 4 Wm. IV. c. 1 (U. C.).

31st day of December, 1851:—The Act 14 & 15 V. c. 6, came into force, 1st January, 1852.

The sections 22 to 26 are considered to contain rules not quite consistent with, or partly superseded by, the rules introduced by sections 31 to 57 (14 & 15 V. c. 6), and are retained chiefly on account of points in title that may arise from instruments dated before 1852.

22. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. R. S. O. 1877, c. 105, s. 13.

Brothers and sisters shall trace descent through parents. Imp. Act, s. 5.

Before the enactment the descent between brothers and sisters was *immediate*: see *Collingwood v. Pace* (z); *Kynnauld v. Leslie* (a).

23. Every lineal ancestor shall be capable of being heir to any of his issue, and in any case where there is no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. R. S. O. 1877, c. 105, s. 14.

Lineal ancestor to be heir in preference to collateral persons claiming through him. Imp. Act, 3-4 Wm. IV. c. 106, s. 6.

All that is left of this section is contained in the words "Every lineal ancestor shall be capable of being heir to any of his issue."

"So that a father (b) shall be preferred":—This is superseded by the later provision contained in section 6 *supra*.

(c) 1 Ventr. 413.

(a) L. R. 1 C. P. 389 (1866).

(b) See in *Re Don's estate*, 4 Drew. 194 (1858), as to father of son legitimized by marriage of parents. See also *Doe v. Vardell*, 7 Cl. & F. 895 (1840); and *Shaw v. Gould*, L. R. 3 H. L. 55 (1850).



"*And a more remote lineal ancestor*":—This is also superseded by the later provision in section 6.

The former rule excluded the ascent of an estate: "It is impossible for the father to be heir immediately to the son; nay, the law says, the land shall rather escheat" (c). This rule was complicated by the absurd exception that the father or mother might inherit as cousin, that which was denied them directly. Thus in *Eastwoode v. Vinke* (d) it was objected that "the father or mother, grandfather or grandmother cannot take as heir to their son or grandson; they may, it is true, inherit by circuitry, as thus: the uncle may take as heir to the son, after which the father or mother may take as heir to the uncle, but the father or mother cannot, as in the present case, succeed immediately and in the first instance to the inheritance of the son.

"On the other side it was said, and so ruled by the *Master of the Rolls*, that though a father or mother could not as *father* or *mother* inherit immediately after the son; yet if the case should so happen that the father or mother were *cousin* to the son, and as such his heir, they might take notwithstanding."

The male line to be preferred.

Imp. Act,  
3-4 Wm. IV.  
c. 106, s. 7.

24. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants shall be capable of inheriting until all his paternal ancestors and their descendants have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting, until all his male maternal ancestors and their descendants have failed. R. S. O. 1877, c. 103, s. 15.

The mother now shares equally with the father, according to section 6 *supra*.

*Proof of exhaustion of paternal line*:—Under this and the next succeeding section, it was necessary for a

(c) *Cowper v. Cowper*, 2 P. Wms. 734 (1734).

(d) 2 P. Wms. 613 (1731).

(e) C  
sufficient

(f)  
Davies v  
Stu. 257

(g) C  
reasonable  
v. Miller

party claiming through a maternal ancestor to produce at trial reasonable evidence that the paternal line was exhausted, and also that the superior maternal lines were exhausted (e).

25. Where there is a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there is a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. R. S. O. 1877, c. 105, s. 16.

The mother of the more remote male ancestor to be preferred to the mother of the less remote male ancestor.

Imp. Act, 3-4 Wm. IV. c. 106, s. 8.

"This adopts Blackstone's well known view, which it is conceived is the true rule" (f).

*Proof of exhaustion of superior lines*:—It is necessary to produce reasonable evidence of the exhaustion of the superior maternal lines, as well as of the paternal line (g).

26. Any person related to the person from whom the descent is to be traced by the half-blood, shall be capable of being his heir, and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female; so that the brother of the half-blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother shall inherit next after the mother. R. S. O. 1877, c. 105, s. 17.

Half-blood to inherit after the whole blood of the same degree.

Imp. Act, 3-4 Wm. IV. c. 106, s. 9.

*Half-blood*:—The same rule will now obtain in regard to the rights of the half-blood to inherit realty as formerly

(e) Greaves v. Greenwood, 2 Ex. Div. 298 (1877). As to what constitutes sufficient evidence see cases under section 25 *infra*.

(f) Lord St. Leonard's New Stat. on R. Property, 2nd Ed. at p. 262. See Davies v. Lowndes, 5 Bing. N. C. 168 (1838); Hawkins v. Spencer, 1 Sim. & Stu. 237 (1823).

(g) Greaves v. Greenwood, 2 Ex. Div. 298 (1877); as to what constitutes reasonable evidence see Lyell v. Kennedy, 18 Q. B. D. 810 (1887); Rawlinson v. Miller, 1 Ch. D. 52 (1875); Jeakes v. White, 6 Exch. 880 (1851).

obtained in regard to personalty (*h*). Under the statute, 1 Ja. II., c. 17, brothers and sisters of the half-blood of an intestate are equally entitled with brothers and sisters of the whole blood to share in the personal property of the intestate (*i*).

DESCENTS ON AND AFTER 1ST OF JANUARY, 1852.

Descents since the 1st January, 1852.

27. The twenty-seven sections numbered from 31 to 57, both included, shall apply retrospectively to the first day of January, 1852 inclusive, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of January, 1852, and shall not apply to estates of persons dying on or after the first day of July, 1886, R. S. O. 1877, c. 105, s. 18.

The first day of January 1852 was the date fixed for the coming into operation of the Act for the abolition of primogeniture (*j*).

The first day of July 1886 was the date fixed for the coming into operation of the Devolution of Estates Act 1886 (*k*).

Interpretation as to sections 31 to 57.

28. In the said twenty-seven sections of this Act numbered from 31 to 57, both inclusive—

“Real estate”

(1) “Real estate” shall be construed to include every estate, interest and right, legal and equitable, held in fee simple or for the life of another (except as in section 49 is excepted) in lands tenements and hereditaments in Ontario, but not such as are determined or extinguished by the death of the intestate seized or possessed thereof, or so otherwise entitled thereto, nor to leases for years; and

“Inheritance.”

(2) “Inheritance,” as therein used, shall be understood to mean real estate as herein defined, descended or succeeded to, according to the provisions of the said twenty-seventh sections. R. S. O. 1877, c. 105, s. 19.

“Legal and equitable.”—The better opinion was that equitable estates followed the same rules of descent as

(*h*) See section 4 (1) *supra*.

(*i*) *Jessopp v. Watson*, 1 My. & K. 665 (1833); *Burnet v. Mann*, 1 Ves. Sen. 156 (1748). See further under section 44 *infra*.

(*j*) 14 & 15 V. c. 6 (Can).

(*k*) 49 V. c. 22 (Ont).

(1)  
736 (173)  
(m)  
1 Mer. 6  
v. Forb.  
1 Chy.  
Strange

legal (*l*); so the present section has not made any change in this respect.

29. Where, in the said sections, numbered from 31 to 57 both included, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent or succession came, and where any person is described as having died, it shall be understood that he died before such intestate. R. S. O. 1877, c. 105, s. 20.

Interpretation as to sections 31 to 57.

"*As living*":—This would include a child *en ventre sa mere* (*m*).

30. Where in any of the said sections the expressions "where the estate came to the intestate on the part of the father" or "mother," as the case may be, are used, the same shall be construed to include every case where the inheritance came to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent. R. S. O. 1877, c. 105, s. 21.

Interpretation as to sections 31 to 57.

31. Where any person dies seised in fee simple or for the life of another of any real estate in Ontario, without having lawfully devised the same, such real estate shall descend or pass by way of succession in manner following, that is to say:—

How real estate of an intestate dying on or after first January, 1852, shall descend.

*Firstly.* To his lineal descendants, and those claiming by or under them, *per stirpes*;

*Secondly.* To his father;

*Thirdly.* To his mother; and

*Fourthly.* To his collateral relatives

subject in all cases to the rules and regulations hereinafter prescribed. R. S. O. 1877, c. 105, s. 22.

This section does not affect estates as tenant in dower or by the curtesy which are excepted by sections 49 *infra*.  
*Per stirpes*:—"Per capita (by number of individuals), opposed to *per stirpes* (by the number of families), if a man die and leave all his goods 'among my grandsons', having

(*l*) Banks v. Sutton, 2 P. Wms. 713 (1732); Cowper v. Cowper, 2 P. Wms. 736 (1734); Trash v. Wood, 4 M. & C. 324 (1839).

(*m*) See *Doc d. Clarke v. Clarke*, 2 H. Bl. 399 (1795); Mogg v. Mogg, 1 Mer. 654 (1815). See also *Clarke v. Blake*, 2 Bro. C. C. 321 (1788); Cooper v. Forbes, *ib.* 63; Freemantle v. Freemantle, 1 Cox, 248 (1786); *Re Corlass*, 1 Chy. D. 460 (1875); Rawlins v. Rawlins, 2 Con. 425 (1796); Northey v. Strange, 1 P. Wms. 341 (1716).

nine grandsons, one of whom was an only son, and the other eight brethren; then if the division be *per stirpes*, the only son shall take half the goods as representing one of his grandsire's two children; if the division be *per capita* he shall take a ninth part only as being one of nine grandsons" (n).

"*Stirps*, L., a root, stock; source of descent. Taking property by representation is called succession *in stirpes* or *per stirpes*, according to the roots; since all branches inherit the share that their root, whom they represent, would have inherited. Whence "stipital distribution" (o).

The statute 22 & 23 Car. II. c. 10, provided as to personalty for this method of distribution in the words "to and amongst the children of such persons dying intestate and such persons as legally represent such children in case any of the said children be then dead" (p). So that in this respect the law is unchanged by the provision in section 4 *supra*, providing that the property shall be distributed as personal property.

*Misleading effect of section* :—Leith says of this section, "The wording of the 22nd section (q) requires explanation as it is somewhat calculated to mislead. It enacts that the estate shall descend to the lineal descendants of the person last seised, and those claiming under them, *per stirpes*. Now this expression at the outset would lead to the inference that the common law rule of succession *per stirpes* was to be the prevailing feature in the statute, whereas it is just the reverse; and it is the civil law rule of succession *per capita* that prevails, and descent *per stirpes* only takes place as an exceptional case as will be seen by the sequel" (r).

(n) Wharton Law Lexicon, 7th Ed. 616.

(o) Anderson, Dictionary of Law, 974.

(p) Section 3.

(q) Now the 31st.

(r) Leith's Blackstone, 473.

32.  
line of  
to such  
in equa  
degree

(s)  
(t)  
(u)  
(v)  
Fuldon  
Eq. 148  
Hibbert  
(w)

*To his father*:—The law as to the distribution of personalty favoured the father but placed the mother and brothers and sisters on an equality (*s*). Section 6 *supra*, places the father upon the same equality.

*Collateral relatives* or kindred are those which descend from the same stock or ancestor as the lineal *relations* but do not descend from each other (*t*).

The strict and accurate meaning of "relatives" is "legitimate relatives" (*u*).

"The word relations taken in its widest extent embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote and hence, unless some line were drawn, the effect would be that every such gift would be void for uncertainty. In order to avoid this consequence, recourse is had to the Statute of Distributions; and it has been long settled, that, a bequest to relations (*v*) applies to the person or persons who would by virtue of those statutes, take the personal estate under an intestacy, either as next of kin, or by representation of next of kin . . . . The rule which makes the Statute of Distributions the guide in these cases is not departed from on slight grounds" (*w*).

32. If the intestate leaves several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, however remote from the intestate the common degree of consanguinity may be. R. S. O. 1877, c. 105, s. 23.

As to descendants in equal degrees of consanguinity.

(*s*) 1 Jac. II. c. 17, s. 7.

(*t*) Wharton's Law Lexicon, 7th Ed. 164.

(*u*) *Per* Sterling, J., in *Jodrell v. Seale*, W. N. (1889) 230.

(*v*) Or "relation" *Pyot v. Pyot*, 1 Ves. Sen. 337 (1749); or "relatives" *Fuldon v. Ashworth*, L. R. 20 Eq. 410 (1875); *Eagles v. Le Breton*, L. R. 15 Eq. 148 (1873); See also *Laulor v. Henderson*, Ir. Rep. 10 Eq. 150 (1876); *Hibbert v. Hibbert*, L. R. 15 Eq. 372 (1873).

(*w*) *Jarman on Wills*, 5th Ed. 972.

This introduced descent *per capita* among those in equal degrees of consanguinity.

If some children be living and others dead leaving issue.

33. If one or more of the children of such intestate are living and one or more are dead, the inheritance shall descend to the children who are living, and to the descendants of such children as have died; so that each child who is living shall inherit such share as would have descended to him if all the children of the intestate, who have died leaving issue, had been living; and so that the descendants of each child who is dead shall inherit in equal shares the share which their parent would have received if living. R. S. O. 1877, c. 105, s. 24.

Same rule as to other descendants in unequal degrees of consanguinity.

34. The rule of descent prescribed in the last preceding section shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, are of unequal degrees of consanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity who have died leaving issue, been living, and so that the issue of the descendants who have died, shall respectively take the shares which their parents, if living, would have received. R. S. O. 1877, c. 105, s. 25.

If the intestate leaves no descendant, right of father, mother, etc.

35. In case the intestate dies without lawful descendants and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and such mother is living; and if such mother is dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; and if there are no such brothers or sisters, or their descendants living, such inheritance shall descend to the father. R. S. O. 1877, c. 105, s. 26.

If there be no father entitled to inherit.

36. If the intestate dies without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and brothers or sisters, or the descendants of brothers or sisters, then the inheritance shall descend to the mother during her life, and the reversion to such brothers or sisters of the intestate, as are living, and the descendants of such as are dead, according to the same law of inheritance hereinafter provided; and if the intestate in such case leaves no brother or sister, nor any descendant of any brother or sister, the inheritance shall descend to the mother. R. S. O. 1877, c. 105, s. 27.

And if there is neither father nor mother.

37. If there is no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there are several of

41. father or sisters, or sisters of such of died, the such brother father.

42. I fifteen se



such relatives all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be. R. S. O. 1877, c. 105, s. 28.

33. If all the brothers and sisters of the intestate are living, the inheritance shall descend to such brothers and sisters; and if any one or more of them are living and any one or more are dead, then to the brothers and sisters and every of them who are living, and to the descendants of such brothers and sisters as have died, so that each brother or sister who is living shall inherit such share as would have descended to him or her, if all the brothers or sisters of the intestate who have died leaving issue had been living, and so that such descendants shall inherit in equal shares the share which their parent, if living would have received. R. S. O. 1877, c. 105, s. 29.

Succession  
of brothers  
and sisters  
and their  
descendants.

39. The same law of inheritance prescribed in the last section shall prevail as to the other direct lineal descendants of every brother and sister of the intestate, to the remotest degree, wherever such descendants are of unequal degree. R. S. O. 1877, c. 105, s. 30.

As to such  
descendants  
in unequal  
degrees.

40. If there is no heir entitled to take under any of the preceding thirteen sections, the inheritance if the same came to the intestate on the part of his father, shall descend;

If there be  
no heir  
under the  
preceding  
13 sections.

*Firstly.* To the brothers and sisters of the father of the intestate in equal shares, if all are living;

*Secondly.* If one or more are living, and one or more have died leaving issue, then to such brothers and sisters as are living, and to the descendants of such of the said brothers and sisters as have died—in equal shares;

*Thirdly.* If all such brothers and sisters have died, then to their descendants; and in all such cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R. S. O. 1877, c. 105, s. 31.

41. If there be no brothers or sisters, or any of them, of the father of the intestate, and no descendants of such brothers or sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as have died, or if all have died, then to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the father. R. S. O. 1877, c. 105, s. 32.

Further  
provision.

42. In all cases not provided for by the next preceding fifteen sections, where the inheritance came to the intestate on

Further  
provision if

the estate came on the mother's side.

the part of his mother, the same, instead of descending to the brothers and sisters of the intestate's father, and their descendants, as prescribed in section 40, shall descend to the brothers and sisters of the intestate's mother, and to their descendants, as directed in the last preceding section; and if there are no such brothers and sisters or descendants of them, then the inheritance shall descend to the brothers and sisters, and their descendants, of the intestate's father, as before prescribed. R. S. O. 1877, c. 105, s. 33.

If estate came neither on father's nor mother's side.

43. In cases where the inheritance did not come to the intestate on the part of either the father or the mother, the inheritance shall descend to the brothers and sisters both of the father and mother of the intestate in equal shares, and to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. R. S. O. 1877, c. 105, s. 34.

Half blood to succeed with whole blood.

44. Relatives of the half blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise or gift from some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. R. S. O. 1877, c. 105, s. 35.

The subject matter of this section will now, in accordance with section 4 (1) *supra*, be governed by the Statute of Distributions.

*Half Blood*:—Under the statute 1 Jac. II. c. 17, brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother, after the death of the intestate's father, in the personal property of the intestate dying without wife or children (*x*). Moreover it has been held that a *posthumous* brother of the half blood takes under the Statute of Distributions (*y*). Those of the half blood have always an equal share with those of the whole blood.

(*x*) *Jessop v. Watson*, 1 Myl. & K. 665 (1833); *Crooke v. Batt*, 2 Vern. 124 (1690).

(*y*) *Burnet v. Mann*, 1 Ves. (Sen.) 156 (1748).

(*z*) *Winchelsea v. Norcliffe*, 1 Vern. 437 (1686).

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114 (1740)

45. On failure of heirs under the preceding rules, the inheritance shall descend to the remaining next of kin of the intestate, according to the rules in the English Statute of Distribution of Personal Estate. R. S. O. 1877, c. 105, s. 36.

In cases not provided for 22-3 Car. II. c. 10, and 29 Car. II. c. 3, to apply.

46. Where there is but one person entitled to inherit according to the provisions of section 27 and following sections of this Act, he shall take and hold the inheritance solely; and where an inheritance, or a share of an inheritance, descends to several persons under such provisions, they shall take as tenants in common, in proportion to their respective rights. R. S. O. 1877, c. 105, s. 37.

Co-heirs to take as tenants in common.

*Only child*:—When a person dies intestate leaving nobody but one child, the whole personal estate belongs to him under the Statute of Distributions (a).

47. Descendants and relatives of the intestate begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. R. S. O. 1877, c. 105, s. 38.

Descendants etc., born after death of intestate, to inherit.

The rule under the Statute of Distributions which now in accordance with section 44 *supra*, governs the subject matter of this section, may here be given.

*Posthumous children*:—The distributary share under the statute vests on the intestate's death, but not so as to exclude a posthumous child (b).

48. Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. R. S. O. 1897, c. 105, s. 39.

Illegitimate persons not to inherit.

Cf. the note, *Property of Foreigners* under 4 (1) *supra*.

49. The estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of the last preceding twenty-two sections of this Act, nor shall the same affect any limitation of any estate by deed or will, or any estate which, although held in fee simple or

Curtesy, dower and estates by deed or will, excepted.

(a) *Palmer v. Gerrard*, Pre. Ch. 21.

(b) *Edwards v. Freeman*, 2 P. Wms. 446 (1727); *Wallis v. Hodson*, 2 Atk. 114 (1740); *Burnet v. Mann*, 1 Ves. (Sen.) 156 (1748).

for the life of another, is so held in trust for any other person, but all such estates shall remain, pass and descend, as if the last twenty-two sections of this Act numbered from 27 to 48, both included, had not been passed. R. S. O. 1877, c. 105, s. 40.

For present state of law as to tenancy by dower or curtesy, *see* section 4 (2), 4 (3) *supra*.

Cases of children who have been advanced by settlement, etc.

50. If any child of an intestate has been advanced by the intestate by settlement, or portion of real or personal estate, or both of them, and the same has been so expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof shall be reckoned for the purposes of this section only, as part of the real and personal estate of such intestate descendible to his heirs, and to be distributed to his next of kin according to law; and if such advancement is equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate. R. S. O. 1877, c. 105, s. 41.

If such advancement be not equal.

51. If such advancement is not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate, as is sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as nearly as can be estimated. R. S. O. 1877, c. 105, s. 42.

Value of property advanced, how estimated.

52. The value of any real or personal estate so advanced shall be deemed to be that, if any, which has been acknowledged by the child by any instrument in writing, otherwise such value shall be estimated according to the value of the property when given. R. S. O. 1877, c. 105, s. 43.

Education, etc., not advancement.

53. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act. R. S. O. 1877, c. 105, s. 44.

*"So expressed by the intestate in writing"*:—It might have been well to continue this provision in The Devolution of Estates Act; Spragge, V.C., says of it: "The provision that the advancement shall be expressed or acknowledged to be such in writing is not in the English statute (c). It

was probably introduced into our statute to avoid the questions which have arisen as to what constituted an advancement" (*d*).

It will be appropriate to give, here, an account of the present law relating to advancement, under the Statute of Distributions, by which the above sections 50 to 53 have been superseded in accordance with the provision contained in section 4 (1) *supra*.

*Advancement and hotchpot*:—Hotchpot (also spelled hodge-podge, hotchpotch, hotspot) is the blending of properties belonging to two or more persons in order to make an equal division as where advancements are treated as returned, and the estate as a whole divided anew (*e*).

The general rule under the Statute of Distributions is that an advancement must be brought into hotchpot. Thus it was held that an advancement of personal property to the eldest son must be brought in (*f*); though any land provision to the heir-at-law of the intestate, however given, is privileged by the Statute of Distributions, and not to be brought into hotchpot (*g*).

*Advancement must be during intestate's lifetime*:—"I admit that a provision for a child by will (for a case may happen, that as to part of the personal estate the testator may die intestate) is not an advancement to be brought into hotchpot; neither shall land given by a will to a [younger] child (*h*); for a provision to be brought

(*d*) *Filman v. Filman*, 15 Gr. 648 (1869). See also *Phillips v. Yarwood*, 21 Gr. 622 (1874), as to what constituted a hotchpot clause.

(*e*) *Anderson's Dictionary of Law*, 515. For history of the word see *Skat's Etymological Dictionary*.

(*f*) *Kircudbright v. Kircudbright*, 8 Ves. 51 (1802).

(*g*) *Edwards v. Freeman*, 2 P. Wms. 440 (1737). Of course this exception is no longer existent in Ontario as far as the eldest son is concerned, the right of primogeniture having been abolished (see introductory note to the present chapter).

(*h*) Cf. *Lutwycke v. Lutwycke*, *Forrest* 277 (1800).

into hotchpot must be such as is made by an Act in the intestate's lifetime and not by will" (i).

*What constitutes an advancement requiring to be brought into hotchpot:—Taylor v. Taylor (j)*, is an interesting case bearing on this subject; Jessel, M.R., considering "that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him,—not a mere casual payment. Accordingly he held the following to be *advancements by portion*:—(1) Payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar (k); (2) the price of a commission and outfit of a child entering the army (l); (3) the price of plant and machinery and other payments for the purpose of starting a child in business. He also held the following *not advancements by portion*:—(1) payment of a fee to a special pleader in the case of a child intended for the Bar; (2) price of outfit and passage money of an officer in the army and his wife on going out to India with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his housekeeping and other expenses.

*Taylor v. Taylor* was dissented from by Pearson, J., in *Blockley v. Blockley (m)*, more particularly as to the payment of debts by the father: "With all deference to the Master of the Rolls, I cannot agree in his view. I think that a sum of money given by a father to his son to pay his debts, is or may be, an advancement as much as a sum of money for any other purpose. In *Boyd v. Boyd (n)*,

(i) *Ib.* at p. 440.

(j) L. R. 20 Eq. 155 (1875).

(k) Or of articling him to a solicitor; *Boyd v. Boyd*, L. R. 4 Eq. 305 (1867).

(l) See *Kircudbright v. Kircudbright*, *supra*; *Andrew v. Andrew*, 22 W. R. 682 (1874); *Boyd v. Boyd*, L. R. 4 Eq. 305 (1867).

(m) L. R. 29 Ch. D. 252 (1885).

(n) L. R. 4 Eq. 305 (1867).



Wood, V.C., said, 'Wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing—the Court does not look to the application. As to the debts, suppose the young man had represented to his father that it was extremely important they should be paid, in order that he might keep his position in the army, and the father had paid those sums in order to assist him, it would have been clearly an advance.' I cannot conceive stronger language than that. In my opinion if a sum of money is paid by a father for the benefit of his son, it is an *advancement by portion*."

*Repairs not an advancement*:—Where the intestate laid out money in repairs on houses that descended to his eldest son it was not considered an advancement, the houses not having been given to the son during the father's lifetime (o).

*Annuities as advancements*:—In *Hatfield v. Minet* (p), by a deed of separation the husband covenanted to pay an annuity to each of his daughters during their respective lives, such annuities to cease if he should again cohabit with wife, which event did not happen. The husband survived his wife and died intestate and it was held that so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements: and that the value of each annuity must be estimated at the death of the intestate and the amount brought into hotchpot. The circumstances of contingency surrounding the granting of the annuities in this case made the court unwilling to consider the payments in the intestate's lifetime as advancements. The case does not, how-

(o) *Smith v. Smith*, 5 Ves. 721 (1801).

(p) *L. R. 8, Ch. D. 136* (1875).



ever, lay down any general rule on the subject; and an annuity may under other circumstances be an advancement. Thus in the case of *Kircudbright v. Kircudbright* (*q*) an annuity was considered to be an advancement to be brought into hotchpot, *i.e.* at the option of the child to bring in the value of the annuity at the date of grant, or of the payments received (the annuity then ceasing).

Where an annuity or rent is charged upon land in favour of a child [formerly of a younger child, not of the *eldest* or heir-at-law (*r*)] it was an advancement (*s*).

*Sum settled on advancement* :—Where a sum has been settled on a son's marriage, the son to take a life estate in same, not only the value of the life estate but of the whole sum is to be brought into hotchpot (*t*).

*Advancement by widow* :—"It weighs with me, that this Act of Distribution was grounded on the custom of London, which never affected a widow's personal estate; and the Act seems to include those within the clause of hotchpot, who are capable of having a wife, as well as children, which must be husbands only; and so in this case, (though without much debate) his Lordship ruled that the daughter should not bring the £1,000 which she had received in her mother's lifetime into hotchpot" (*u*).

*Widow not benefitted by bringing into hotchpot* :—The bringing into hotchpot is for the benefit of the children: the widow does not take any increased share thereby (*v*).

(*q*) 8 Ves. 51 (1802).

(*r*) *Chantrell v. Chantrell*, 37 L. T. N. S. 220 (1878).

(*s*) *Edwards v. Freeman*, 2 P. Wms. 443 (1727); cf. *Pratt v. Pratt*, Fitz. 284, Stra. 935 (1719).

(*t*) *Wayland v. Wayland*, 2 Atk. 635 (1742); see also *Phiney v. Phiney*, 2 Vern. 638 (1708).

(*u*) *Holt v. Frederick*, 2 P. Wms. 356 (1726).

(*v*) *Kircudbright v. Kircudbright*, 8 Ves. 51 (1802).

54. The parties authorized to make partition of any such real estate according to law, shall receive from any of the persons entitled to a share of such real estate, an offer or proposition to purchase the share or shares of the other parties interested therein, giving the preference to the person who would have been the heir-at-law thereto, had section 27 and the following sections of this Act not been passed; and next after such heir-at-law, giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate. R. S. O. 1877, c. 105, s. 45.

55. The parties so authorized to make such partition shall certify particularly to the Court in which proceedings for a partition are commenced or pending, the particulars of such offer or proposition for purchase, the nature, quantity and value of the estate or share proposed to be purchased, and whether they advise such offer or proposition to be accepted or rejected, and their reasons therefor. R. S. O. 1877, c. 105, s. 46.

56. Any Court authorized to make partition of real estate may direct a sale of the same if it thinks it right so to do, upon the application of any of the parties beneficially interested therein, giving however the preference at all times to the person who would have been the heir-at-law to such real estate had section 27 and the following sections of this Act not been passed, and after such heir-at-law, then giving such preference to the several persons successively who would have been such heir-at-law, had the said last mentioned sections of this Act not been passed, and had those persons preceding them respectively in the series of such preference been dead at the time of the death of the intestate. R. S. O. 1877, c. 105, s. 47.

57. Every such preference shall be upon and subject to such terms, security and conditions, as the Court thinks it right to direct. R. S. O. 1877, c. 105, s. 48.

As to the purchase by any of the parties interested of real estate subject to partition.

Particulars of offer to purchase to be certified to the Court.

Any Court authorized to make partition may direct a sale, giving preference to the heir-at-law.

Terms on which preference to be given.

Cf. notes under Chap. 104 *supra*, as to partition.

The following table has been found useful by practitioners for the quick solution of problems in distribution; references are added to the pages of this work to shew the law relating to realty as well as to personalty:—

## PERSONAL ESTATE OF INTESTATES SINCE JULY 1, 1886—ONTARIO.

If the Intestate die leaving :	his personal representatives take thus, viz.,
Wife and child or children ....	One-third to wife, rest to child or children; if children dead, then to their representatives (that is their lineal descendants), except such child or children (not heirs-at-law) who had estate by settlement of intestate or were advanced by him in his life-time equal to the other shares. [See pp. 294, 295 and notes under section 53.]
Wife only .....	Half to wife; rest to next of kin, in equal degree to intestate, or their legal representatives, or if no next of kin, to the Crown. [See pp. 295 and 303.]
No wife or child .....	All to the next of kin, and to their legal representatives. [See p. 295.]
Child, children, or their representatives .....	All to him, her or them. [See p. 295.]
Children by two wives .....	Equally to all. [See notes under sec. 44.]
If no child, children or representatives .....	All to next of kin, in equal degree to intestate. [See p. 295.]
Child or grandchild by deceased child .....	Half to child, half to grandchild, who takes by representation. [See p. 295.]
Husband only .....	Half to him and half as if he had predeceased intestate. [See p. 306.]
Husband and child or children	Third to husband and two-thirds to children. [See p. 306.]
Father and mother .....	Equally to both. [See p. 307.]
Father, mother, brother or sister	Equally to all. [See p. 307.]
Mother and brother or sister ...	Whole to them equally. [See p. 303.]
Wife, mother, brother, sister and nieces .....	Half to wife, residue to mother, brothers, sisters and nieces. [See pp. 295, 300.]
Wife and father .....	Half to wife, half to father. [See p. 295.]
Wife, mother, nephew and nieces	Two-fourths to wife, one-fourth to mother, and one fourth to nephew and nieces. [See p. 300.]
Wife, brother, or sister and mother .....	Half to wife (under Stat. of Chas. II.) Half to brothers, or sister and mother. [See p. 295.]
Mother only .....	The whole (it being then out of the statute). [See p. 296, and notes to sec. 31.]
Wife and mother .....	Half to wife and half to mother. [Ditto.]
Brother or sister of whole blood and brother and sister of half blood .....	Equally to both. [See notes under sec. 44.]
Posthumous brother or sister and mother .....	Equally to both [See notes under secs. 44, 47.]
Posthumous brother or sister, and brother or sister born in lifetime of father .....	Equally to both. [Ditto.]
Father's father and mother's mother .....	Equally to both. [See p. 301.]
Uncle's or aunt's children, and brother's or sister's grandchildren .....	Equal to all. [See p. 300.]
Grandmother, uncle or aunt .....	All to grandmother. [See p. 300.]
Two aunts, nephew and niece .....	Equally to all. [See p. 300.]
Uncle and deceased uncle's child	All to uncle. [See p. 300.]
Uncle by a mother's side, and deceased uncle's or aunt's child .....	All to uncle. [See p. 300.]

## PERSONAL ESTATE OF INTESTATES SINCE JULY 1, 1886—ONTARIO.

If the Intestate die leaving : his personal representatives take thus, viz.,

Nephew by brother and nephew by half sister .....	Equally, <i>per capita</i> . [See p. 300.]
Brothers or sisters, and nephews or nieces .....	Whole, the nephews or nieces, taking <i>per stirpes</i> and not <i>per capita</i> . [See p. 295.]
Nephew, by deceased brother, and nephews and nieces by deceased sister .....	Each in equal shares <i>per capita</i> and not <i>per stirpes</i> . [See pp. 295, 300.]
Brother and grandfather .....	All to brother. [See p. 301.]
Brother's grandson and brother or sister's daughter .....	To daughter. [See p. 300, note (2).]
Brothers and two aunts .....	To brother. [See p. 300.]
Brother and wife .....	Half to brother and half to wife. [See p. 295.]
Mother and brother .....	Equally. [See p. 296.]
Wife, mother or children of deceased brother or sister ...	Half to wife, one-fourth to mother, one-fourth <i>per stirpes</i> to deceased brother or sister's children. [See pp. 295-296.]
Wife, brother or sister, and children of deceased brother or sister.	Half to wife, one-fourth to brother or sister <i>per capita</i> , one-fourth to deceased brother or sister's child <i>per stirpes</i> . [See p. 295.]
Brother or sister and children of a deceased brother or sister.	Half to brother or sister <i>per capita</i> , half to children of deceased brother or sister <i>per stirpes</i> . [See p. 295.]
Grandfather or brother .....	All to brother. [See p. 301.]

Descendants of intestates always take *per stirpes*: *Re Natt*, 37 Ch. D. 517.

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R. S. O. 1887, CHAPTER 111.

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## R. S. O. 1887, CHAPTER 111.

An Act respecting the Limitation of Actions relating to Real Property, and the time of Prescription in certain cases.

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BE DEEMED POSSESSION OF THE  
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ACKNOWLEDGMENT TO BE EQUIVALENT  
TO POSSESSION OR RECEIPT OF  
RENT, s. 13.  
RECEIPT OF RENT TO BE DEEMED  
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RENT AND INTEREST TO BE WITHIN  
SIX YEARS, ss. 16-18.  
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COUNTED, s. 40.  
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PUTING TIME IN CERTAIN CASES,  
s. 41.  
EXCEPTION AS TO LANDS OF THE  
CROWN, s. 42.  
IN CASES OF LAND OR RENT, ss.  
43-45.  
FIVE YEARS ALLOWED FROM THE  
TERMINATION OF DISABILITY,  
s. 43.  
TWENTY YEARS THE UTMOST ALLOW-  
ANCE, s. 44.  
NO FURTHER TIME FOR A SUCCEES-  
SION OF DISABILITIES, s. 45.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Short title. 1. This Act may be cited as "*The Real Property Limitation Act.*" R. S. O. 1877, c. 108, s. 1.

Interpretation. 2. Where the following words occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

"Land." (1) "Land" shall extend to messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land (and to chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency ;

*Equity of redemption* :—"By the interpretation clause of R. S. O. c. 108 (a), the term 'land' covers any estate of inheritance or any estate transmissible to heirs. This includes an equity of redemption in fee simple lands" (b).

"*Hereditaments, whether corporeal or incorporeal*" :—There is considerable question as to the real scope of the present apparently very wide definition. Thus in *Mykel v. Doyle* (c), Haggarty, C.J., cuts the definition down very considerably by interpreting it in the light of what are now sections 4 and 15, the language of which "seems to point wholly to corporeal rights, claims to the land, or rent in specie."

In fact we may take the present definition as intended to cover all possible cases properly coming under either the Limitation Act or the Prescription Act (d), without

(a) *i.e.* the present section.

(b) *Boyd, C.*, in *Fletcher v. Rodden*, 1 O. R. 161 (1882).

(c) 45 U. C. R. 65 (1880), followed in *McKay v. Bruce*, 20 O. R. 709 (1891).

(d) See under section 35 *infra*, for distinction.



necessarily subjecting all the classes of property included in the definition, to the provisions of both Acts.

(2) "Assurance" shall mean any deed or instrument (other than a will) by which any land may be conveyed or transferred ; and

"Assurance."

(3) "Rent" shall extend to all annuities and periodical sums of money charged upon or payable out of any land. R. S. O. 1877, c. 108, s. 2.

"Rent."

3. This Act shall commence and be deemed to have taken effect, and chapter 88 of the Consolidated Statutes of Upper Canada, and section 22 of the Act passed in the thirty-second year of Her Majesty's reign, and chaptered 7, to have been repealed, on and after the first day of July in the year of our Lord 1877, as respects any person who on and for twelve months continuously after the twenty-first day of December, 1874, resided without this Province, and is a person entitled to make an entry or distress or to bring an action to recover any land or rent ; or so resident, is a mortgagor, or person entitled to redeem within the meaning of sections 19, 20 or 21 of this Act ; or so resident is a person entitled to, or claiming under a mortgage within the meaning of section 22 ; or so resident is a person entitled to bring an action, or other proceeding within the meaning of section 23 ; or so resident is a person entitled to an action or other proceeding within the meaning of section 24 ; or so resident is a person claiming an estate, interest or right, to take effect after or in defeasance of an estate tail within the meaning of section 29 ; or so resident is a person entitled to demand dower ; and except as respects the persons, and in the cases, mentioned above in this section, this Act shall be deemed to have commenced and taken effect, and the said Acts to have been repealed from and after the first day of July, 1876. R. S. O. 1877, c. 108, s. 3.

Commencement of Act.  
C. S. U. C.  
c. 88; 32 V.  
c. 7, s. 22.

1st of July, 1877, is the date fixed by 38 V. c. 16 for the commencement (as respects the persons here enumerated) of that Act, which was assented to 21st December, 1874.

"Or so resident" :— The term of prescription for immoveables is usually governed by the *lex situs*, i.e., the law of the state where the immoveables are situate (e). See *Beckwith v. Wade* (f), as to absentee; *Re Peat's*

(e) See *Hewitt on Limitations*, 2; *Weslake, Private International Law*, 3rd ed., p. 194.

(f) 17 Ves. 87 (1806).

*Trusts (g)*; *Pitt v. Lord Dacre (h)*, a case where arrears of an annuity on an estate in Jamaica, held recoverable, though they would not be recoverable out of an estate situate in England.

## LAND OR RENT.

No land or rent to be recovered but within ten years after the right of action accrued.  
Imp. 3-4 Wm. IV. c. 27, s. 2; 37-38 V. c. 57, s. 1.

4. No person shall make an entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims; or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. R. S. O. 1877, c. 108, ss. 4, 29.

"*Person*":—"The word 'person' shall include any body corporate or politic or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law" (i).

*Action brought; at what point currency interrupted*:—"We have already intimated our opinion that the commencement of the suit prevents the operation of the statute. But it was contended that the great delay in suing out the alias writ was to be considered. In what way, or on what principle, we cannot see. There was the judgment, which authorized the issuing of the writ. We cannot in this case extend or limit the plaintiff's right to his execution other than the law gives" (j).

(g) L. R. 7 Eq. 302 (1869).

(h) 3 Ch. D. 295 (1876).

(i) R. S. O. 1887, c. 1, s. 8 (13). See as to corporations, *Wych v. E. India Co.*, 3 P. W. 309 (1734); *South Sea Co. v. Wymondsell*, 3 P. W. 143 (1732); as to charities, before 3 & 4 Wm. IV., *Atty.-Gen. v. Mayor of Coventry*, 3 Mad. 368 (1818); as to charities, after 3 & 4 Wm. IV., and as to an uncertain or fluctuating class, *Magdalen College v. Atty.-Gen.* 6 H. L. C. 267 (1858); as to trustee in bankruptcy, *Re Mansell, ex p. Norton* (1892), W. N. 32.

(j) *Turley v. Williamson*, 15 U. C. C. P. 541 (1865). See *Doe Ausman v. Minthorne*, 3 U. C. R. (1847).

*Proceeding under Quieting Titles Act*:—A proceeding under the "Quieting Titles Act" is not such a proceeding as will prevent the running of the statute (*k*).

*Foreclosure action*:—"I think it is too late now to argue that a foreclosure suit is not a suit for the recovery of land" (*l*).

*Redemption action*:—"If I am wrong in holding that under the words of our statute an action to redeem is not, properly speaking, 'an action to recover land' within the previous section of the statute, I am content to err in such good company as the late Master of the Rolls, who so held in *Kinsman v. Rouse*, 17 Ch. Div. 107" (*m*).

"I think it well, however, to add that, if I had to choose between the decisions in *Caldwell v. Hull* (*n*), and those in *Kinsman v. Rouse* (*o*) and *Foster v. Paterson* (*p*), I should certainly have agreed with the learned judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division were decided, the House of Lords has held, in *Pugh v. Heath* (*q*), that a foreclosure suit is an action for the recovery of land. This being so, it follows *a fortiori* that a redemption suit is also an action for the recovery of land" (*r*).

5. In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned;

When the right shall be deemed to have first accrued.

(*k*) *Laing v. Avery*, 14 Gr. 33 (1867).

(*l*) *Ferguson, J.*, in *Fletcher v. Rodden*, 1 O. R. 162 (1882), citing *Heath v. Pugh*, 6 Q. B. D. 345; *Wrixon v. Vize*, 3 Dr. & War. 104; and *Harlock v. Ashberry*, W. N. 18 Feb. 1882, 19 Chy. D. 539. See *Barwick v. Barwick*, 21 Gr. 39 (1874). See *Hugill v. Wilkinson*, 38 Ch. D. 480 (1888), foreclosure action on an equitable charge on a contingent reversionary interest.

(*m*) *Burton, J.A.*, in *Faulds v. Harper*, 9 A. R. 550 (1884).

(*n*) 8 U. C. L. J. 42.

(*o*) 17 Ch. D. 107.

(*p*) 17 Ch. D. 132.

(*q*) 7 App. Cas. 235.

(*r*) *Strong, J.*, in *Faulds v. Harper*, 11 S. C. R. 655 (1886).

On dis-  
possession.  
Imp. Act,  
3-4 Wm.  
IV. c. 27,  
s. 3.

(1) Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in the receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

*Possession of different kinds of property, must be such as property is capable of:*—"The term 'possession' has no definite meaning. Erle, J., in *Stevenson v. Newnham*, 17 Jur. 600, said, 'Possession has a hundred different meanings'; and there can be no doubt that that is so. There may be mere naked possession, as that of a wrongdoer or finder; or that possession which property or the right of property draws to it, and which is available to the owner while he may be miles away from his property; or that possession which in law one was deemed to have when seisin was delivered of one parcel in the name of it and all the other parcels which lay in the same country; or that possession which passes without entry under a bargain and sale; or that possession which the owner of the soil of a highway may still have in the soil, though he has parted with the easement of travel upon it, and though he may never enter on it himself; or where no dedication has been made of the highway, but travel is permitted upon it by sufferance of the owner, who preserves his entire interest in the soil, and his control over the use of it for travel, by yearly putting up a bar, or doing some other act in contravention of the public right and as evidence of his own, or that possession which the landlord has by his tenant, the bailor by the bailee, the trustee by the *cestui que trust*, the master by the servant. There is the possession also of the sheriff who levies, or of the bailiff who distrains; the possession of shares in an incorporated company; the possession of water or gas pipes laid in the soil of another; the possession of different incorporeal hereditaments and

(6)  
F.  
actual  
Elphinstone  
where  
1133, R.  
of road  
v. Gild  
R. Co.  
possession  
ground  
etc. sup.  
v. Parr  
Stanley  
D. 719.  
Smith,  
Ves. 306  
562, m

mere easements; and the possession of a vote or of an office; and many other kinds of possession, which might be multiplied, and which differ from each other in kind, in character, and in degree, and which in no sense bear that meaning of possession which is popularly or loosely attached to the expression. There is possession of the watch which one carries, of the house he lives in, of the field he works, of the wild land attached to his lot, and of the vacant lot which he may have in a different township. The possession of these properties is different in kind. But if the possession which is had of them be such a possession which they are respectively capable of, and such a possession which people generally have of them, then the possession which the person has of the vacant lot, from which he is distant, is just as good a possession in law as that which he has of the watch on his person" (s).

With so many different meanings of possession, it is not surprising that we should have a considerable diversity of opinion in decided cases as to what constitutes possession. Nor is this diversity made less by the different degrees of leniency with which different judges are prone to regard the man who sets up the "parliamentary title" by possession, in opposition to the paper title of another. Thus, on the one hand, we find Wilson, C.J., saying:—"The actual settler

(s) Wilson, C.J., in *Davis v. Henderson*, 29 U. C. R. 353 (1869).

For further cases as to what in particular kinds of property constitutes actual possession: See *Brislow v. Cornican*, 3 App. Cas. 641 (1878), *Clark v. Elphinstone*, 6 App. Cas. 164 (1880), *Jones v. Williams*, 2 M. & W. 326 (1837), where possession of part is possession of whole; *Smith v. Stocks*, 17 W. R. 1155, road and gravel pit; *Tottenham v. Bryne*, 12 Ir. C. L. R. 376, possession of road by building wall; *Worsam v. Vandenbrande*, 17 W. R. 53, fence; *Phillipson v. Gibbon*, L. R. 6 Ch. 428 (1871), possession of wall; *Norton v. London & N. W. R. Co.* 13 Ch. D. 268 (1879), *Searby v. Tottenham*, L. R. 5 Eq. 409 (1868), possession of hedge or ditch; *Rains v. Buxton*, 14 Ch. D. 537 underground cellar; *Bobbett v. S. E. Ry.* 9 Q. B. D. 424 (1882), *Norton v. London, etc. supra*, land of railway company; *Rich v. Johnson*, Str. 1142, mines; *Taylor v. Parry*, 1 M. & Gr. 604, *Wild v. Holt*, 9 M. & W. 672, *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. 186, part of mine for whole; *Ashton v. Stock*, 6 Ch. D. 719, adjoining mines; *Keyse v. Powell*, 2 Ell. & Bl. 132, *Seddon v. Smith*, 36 L. T. 168, minerals acquired with surface; *Seaman v. Vawdrey*, 16 Ves. 390, *McDonnell v. McKinty*, 10 Ir. L. R. 514, *Smith v. Lloyd*, 9 Exch. 562, minerals not so acquired.

who has occupied and cultivated for [twenty] years has, by our Legislature, a stronger moral claim to the land he has lived on for [twenty] years, than the holder of the paper title has, who has so long neglected or abandoned it" (t). While, on the other hand, we have Rose, J., saying, in *Western Loan Co. v. Garrison* (u), that, "where a party comes before the Court as a mere trespasser, or occupying land without any moral claim, in other words, as a thief stealing land, every energy is bent to prevent him acquiring title."

In view of such diversity in the nature of possession and in the opinions relating thereto, it will be advisable to first lay down some general rule as to what constitutes possession within the meaning of the statute, and then more particularly to examine into what acts constitute possession in reference to different persons and properties. The general rule we may find in the decision of Gwynne, J., in the following paragraph.

*The possession that bars title and the possession that gives it:*—"Now, by a long unbroken chain of decisions extending over a period of upwards of 40 years, it has been held by the courts in *Upper Canada* that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation by some person or persons (it matters not, whether in privity with each other in succession or not) to the exclusion of the true owner for the full period of [20 years (v)]; and that to transfer the title to the person in possession at the expiration of the [20 years] such person must claim privity with the persons preceding him in the possession during the period of [20 years], unless he himself was continuously in such possession during that period. The difference being that while any person in possession,

(t) *Davis v. Henderson*, 29 U. C. R. 356 (1869).

(u) 16 O. R. 82 (1888).

(v) Read ten years now, for twenty.



after the title of the true owner is barred by a possession to his exclusion for [20 years] may defend successfully an action of ejectment brought by the original owner, however short may have been the possession of such defendant, and notwithstanding his want of privity with the persons in possession during the [20 years], yet no one can *recover as plaintiff* in ejectment in virtue of a *title* acquired by possession against the true owner for [20 years] under the provisions of the statute, unless he himself alone or *in privity* with others in possession before him had that continuous possession which was required to *bar* the true owner; and payment of taxes or the committing of acts of trespass, by cutting timber from time to time, by a person not in actual visible possession, will, avail nothing towards establishing the possession which the statute requires (*w*).

*Privity of title between successive occupiers need not be evidenced by deed*:—"There is no doubt that a possessory title, that might by lapse of time become perfected under the statute, may be the subject of sale or devise: *Asher v. Whitlock*, L. R. 1 Q. B. 1. And upon the sale to D, H. gave up the possession and D. took it. D. then had a right to call for a legal transfer, and might have obtained it by a suit for specific performance. His equitable title was perfect. And it has been decided in *Thorne v. Williams*, 13 O. R. 577, that an action for recovery of land may be brought upon an equitable title"(*x*).

(*w*) *Per* Gwynn, J., in *McConaghy v. Denmark*, 4 S. C. R. 633 (1880); citing *Morgan v. Simpson*, 5 O. S. 335, *Doe Taylor v. Sexton*, 8 U. C. R. 266; *Allison v. Rednor*, 14 U. C. R. 462; *Doe Lloyd v. Henderson*, 25 U. C. C. P. 256 (1875), there must be possession by another; *Doe Carter v. Bernard*, 13 Q. B. 945 (1849), possession of wife following that of husband; *Canada Co. Company v. Douglas*, 27 U. C. C. P. 343; *Clements v. Martin*, 21 U. C. C. P. 512; *Doe McDonell v. Rattray*, 7 U. C. R. 321; *Doe Shepherd v. Bayley*, 10 U. C. R. 320, *Young v. Elliott*, 23 U. C. R. 424, *Doe Goody v. Carter*, 9 Q. B. 863; *Doe Cuthbertson v. McGillis*, 2 U. C. C. P. 124-150; *Randall v. Stevens*, 2 El. & B. 641; see also *Walton v. Woodstock Gas Light Co.*, 1 O. R. 630 (1882). See also notes under section 15 *supra*.

(*x*) *Proudfoot, J.*, in *Simmons v. Shipman*, 15 O. R. 301 (1888).



*Possession claimed by what classes of persons?* We shall find in a great many of our Canadian cases three classes of persons claiming possession (whether to stop the currency of the statute or to set it running); the respective rights of which classes it is necessary to carefully distinguish:—

(1) The rightful owner *i.e.* the person having a perfect paper title;

(2) The claimant who enters believing himself possessed of a perfect paper title which subsequently turns out to be defective (*y*); and who though in some sense a trespasser (*z*), when he entered, was not a mere trespasser.

(3) The squatter or *mere* trespasser, who enters without right or color of right (*a*).

The failure to carefully follow out the results that arise from the proper distinction of the second and third classes, is accountable for whatever confusion or apparent conflict exists in our decisions, touching such claimants.

Of the right of the first and second classes the most conspicuous feature is that embodied in the doctrine of constructive possession.

*Doctrine of constructive possession*:—"In order that the statute may operate against the owners out of possession, actual possession in fact in another is essential, in order that the rule of law which attributes a possession actually vacant to the person who has the legal title may be rendered inapplicable" (*b*). In *Weld v. Scott* (*c*), Robinson, C.J., speaking of the position of a mere trespasser says:—"The distinction between such an occupant and another, who either shows a right to the whole land

(*y*) See *Davis v. Henderson*, 29 U. C. R. 355, 360 (1869).

(*z*) See *Young v. Elliott*, 25 U. C. R. 334 (1866).

(*a*) *Davis v. Henderson*, *supra*.

(*b*) *Gray v. Richford*, 2 S. C. R. 455 (1878).

(*c*) 12 U. C. R. 537 (1865).

in question, or is residing upon and cultivating part of a lot of land to the whole of which he claims title under conveyances which, if they were valid, would cover the whole, is that the latter classes of occupants are regarded as being constructively in possession of the lot covered by their deeds, while they are in possession of a part; but a mere trespasser's occupation is not to be extended in contemplation of law by any such construction."

"Actual occupation of the land is not required to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it. An actual entry made for the purpose of taking possession is sufficient evidence of the actual possession of the land by the legal owner"(d).

*No constructive possession by vendor (having legal title), as against vendee:—*"It was further contended on the part of the plaintiff that M. having the legal title was in constructive possession of so much of the lot as there had not been an actual possession of by others. But I do not find that this rule has ever been held to apply in favour of a vendor against his vendee who has received possession and paid his purchase money"(e).

*Rule for construing statute against mere trespassers:—*"The rule, as I understand it, has always been to construe the Statutes of Limitations in the very strictest manner where it is shewn that the person invoking their aid is a mere trespasser, having no color of title, and such a construction commends itself to one's sense of right. They were never in fact intended as a means of acquiring title, or as an encouragement to dishonest people to enter on the land of others with a view to deprive them of it . . . .

(d) *Donovan v. Herbert*, 4 C. P. 642 (1884), *per* Wilson, C.J.; citing *Co. Litt.* 245b; *Barnett v. Earl of Gildford*, 11 Ex. 19, *Turner v. Doe, d. Bennett*, 9 M & W. 643.

(e) *Mowat V.C. in McKinnon v. McDonald*, 13 Gr. 158 (1867).

The objects of these statutes were altogether different. The policy was, in the interest of the community, not to allow a possession to be questioned after it has been enjoyed for such a length of time as rendered it unreasonable in the eye of the law to require evidence *aliunde* that it was holden under a title derived from some other and sufficient source, when such evidence by reason of the lapse of time might not be easily attainable. It never could have been the intention of the Legislature to encourage persons wrongfully to enter on the land of others, although from the frame of the enactment it sometimes operates to protect a possession under a bad title, or no title at all; but such operation is, I apprehend, a consequence of the enactment, and not an object of it "(f)

*Mere trespasser confined to his pedal possession* :—"We think to allow the plaintiff to recover on the evidence that was given would be contrary to the legal principal constantly upheld and frequently made the ground of decision in this court, that a person wrongfully in possession of any land belonging to another, which is not covered by any title under which he can assume to hold it, gains no right under such possession to more than the land which his actual possession covers. He is confined to what has been called his pedal possession; and even occasional acts of trespass committed by him on other parts of the property will not be taken as extending his actual peaceable possession over such parts "(g).

"The original taking of possession being wrongful and without color of right, how can the plaintiff be deprived of more than the defendants have actually cultivated or enclosed? There can in such a case be no constructive

(f) *Per* Burton, J.A., in *Harris v. Mudie*, 7 A. R. 421 (1882) citing *Doe Shepherd v. Bayley*, 10 U. C. R. 318; *Doe Beckett v. Nightingale*, 5 U. C. R. 518; *Edmunds v. Waugh*, L. R. 1 Eq. 421.

(g) *Robinson, C.J.*, in *Weld v. Scott*, 12 U. C. R. 537 (1855).

possession; for the constructive possession is in the person having the legal title, both cannot be in constructive possession of the same land.

"The doctrine of constructive possession can obviously have no application to the case of a trespasser, and it could not be carried out without becoming involved in serious difficulties and absurdities" (*h*).

"No man is to lose his land by the constructive possession of another: the possession should be actual and to the exclusion of the true owner. The evidence to support such a necessary possession may be valid in degree. The best and most significant evidence would be, of course, the enclosure of the land claimed, and juries should be carefully warned not to accept occasional acts of trespass as a continuous possession (*i*)."

"*Harris v. Mudie* 7 A. R. 414, was referred to as in effect overruling *Steers v. Shaw*, but I do not think the cases at all inconsistent. *Harris v. Mudie* was the case of mere trespassers entering wrongfully and without colour of right, while this case, as also *Steers v. Shaw*, 1 O. R. 26, is the case of occupation in the honest belief of the plaintiff that he was the owner, and for more than ten years apparently in the honest belief . . . of the owner of the adjoining lot that this was the true dividing line between them (*j*).

*Where possession is not exclusive, in whose favour is it?*—The result of the cases seems to be that where several persons are in occupation, the statute will not run in favour of one against the others; but the possession will be deemed that of the rightful owner. "I take it to be a well estab-

(*h*) *Harris v. Mudie*, 7 A. R. 420 (1882), *per* Burton, J. A.

(*i*) *Steers v. Shaw*, 1 O. R. 32 (1882), *per* Haggarty, C. J., *cf.* *Walton v. Woodstock Gas Light Co.*, 1 O. R. 637 (1882), following *Smith v. Lloyd*, 9 Ex. 562.

(*j*) *McGregor v. Keiller*, 9 O. R. 681 (1883). See also *Robertson v. Daley*, 11 O. R. 352 (1886); *Arnold v. Cumner*, 15 O. R. 382 (1888).

lished principle of law that if two parties are in possession of a lot of land, one having title to it and the other without title, the possession will enure for the benefit of the one having title "(k).

Thus in *McArthur v. McArthur* (l), Robinson, C.J., says:—"But clearly the defendants have no right: they were not both or either of them in exclusive possession, but were living with their mother as members of her family. They did not become disseisors by merely coming of age; and the statute ran no more in their favour at one time than another, so long as their mother was in possession as head of the family, nor at all more than it would have done in favour of any other relation, or a farm-servant who had remained the same length of time upon the place."

Nor will the statute run against a person who though living upon the premises is nevertheless incapable of taking the active management of the same, and is maintained by the other occupant or occupants. Thus in the same case of *McArthur v. McArthur* the Chief Justice said: "It signified nothing that the mother was for seven years incapable from age of taking the active management of the farm, and that her son P. may have chiefly managed it for her.

"If the law were so absurd as to look upon a son so situated as in possession to the exclusion of his mother, it would make it necessary for the widow to turn all her sons and daughters out of the house" (m).

Nor does it matter that the person so maintained by the other occupants, does not affect to own or have any interest in the property (n).

(k) Ritchie, C.J., in *Gray v. Richford*, 2 S. C. R. 442 (1878).

(l) 14 U. C. R. 544 (1857); cf. *Foley v. Foley*, 26 Gr. 463 (1879).

(m) *Ib.* at p. 545. See also *White v. Haight*, 11 Gr. 420 (1865); *Orr v. Orr*, 31 U. C. R. 13 (1871); *McKinnon v. McDonald*, 11 Gr. 432.

(n) *Holmes v. Holmes*, 17 Gr. 610 (1870), citing *Doe Groves v. Groves*, 10 Q. B. 486.

On the other hand where the heir-at-law being in the active management of the property conveyed to a *bona fide* mortgagee and the title by which the widow claimed was under an unregistered will, it was held that the widow's heirs could not set up her possession as against such a *bona fide* mortgagee or purchaser (o).

*Payment of taxes not conclusive evidence of possession :*

—The cases in our Canadian Courts shew the equivocal nature of the payment of taxes as evidence of possession. Thus in an early case of *Doe, Perry v. Henderson* (p), we find the Court saying: "Something was said in the argument on the effect of Robert R. Perry having paid the taxes by his father's direction; but that could be of no effect, unless it might seem to place him in the situation of a mere agent of his father, and give that character to his occupation. It is clear, however, that he was in fact occupying for his own benefit, not as the servant or agent of his father; and his paying the taxes under such circumstances is no more than what he ought to have done without any such direction. The tenant or occupant is *prima facie* liable to taxes; and there was no evidence that he was advancing them for his father, to be repaid as an agent would be. If his father had made him a deed in 1818, he must have paid the taxes; and the insisting upon it that he should do so, is a confirmation, so far as it goes, that his father threw upon him the liabilities of owner of the property."

More stress was given to the payment of taxes in a later case of *Davis v. Henderson* (q), where Morrison, J., says: "I notice the remark that the paying of taxes signifies nothing (r). With the greatest respect for the opinion

(o) *Stephens v. Simpson*, 15 Gr. 594 (1869).

(p) 3 U. C. R. 500 (1847).

(q) 29 U. C. R. 359 (1869).

(r) *Made by Robinson, C.J., in Doe McDonell v. Rattray*, 7 U. C. R. 326.



of that very able judge, I think it is an important fact. If a party is assessed and pays taxes for the whole lot for the period in question, and while he is in occupation or living on the lot, it not only indicates that he claims the right of property and possession, but the act itself is done with a view and in order to preserve his right, property, and possession in the whole lot, and to prevent its being forfeited. It is, I think, some evidence of a continued assertion of his right of property in and possession of the whole lot or such portion of it as he is assessed for. On the other hand, we cannot shut our eyes to the fact, that were it not for this very act of ownership on the part of the occupier, the title and right of the party who has slept on his rights would irrespective of the question of possession, have been totally extinguished long prior to the end of the [twenty] years."

In *Re Jarvis v. Cook* (s), Spragge, C., said: "There has been no such possession by the vendor as would be a possession under the Statute of Limitations, for such period as would extinguish the right of any one. There has been a payment of taxes for over ten years, but that has never been adjudged to be sufficient. In *McDonell v. Rattray* (t), Sir John Robertson said: 'The paying of taxes signifies nothing.' Mr. Justice Morrison, in *Davis v. Henderson* (u) questioned this; and thought it an important fact."

In *Seale v. Johnston* the equivocal nature of paying taxes and also of making repairs is shown. For in that case one B. being in undisturbed possession did those acts as well as cultivated the soil, and it was set up that he had agreed with the owner to pay taxes and keep the place in repair (v).

(s) 29 Gr. 306 (1881).

(t) 7 U. C. R. 326.

(u) 29 U. C. R. 359 (1869).

(v) 13 A. R. 349 (1886); the Court, however, did not consider the agreement sufficiently established to take the case out of the statute; which, however, does not affect the possibility that such an agreement might in any case exist. See further *Walton v. Woodstock Gas Light Co.*, 1 O. R. 630 (1882). See 16 A. R. 484.

(w)  
(x)  
11 Hare  
R. 196;  
4 Q. B. 2  
(y) I  
277, as to



The upshot of the matter seems to be that payment of taxes is some evidence, but alone is not *sufficient* evidence of possession.

*Tax sale ; when does time begin to run :—*While considering the subject of taxes it may not be inappropriate to add the following note : " The statute did not commence to run from the date of the tax sale, and during the pendency of the certificate of sale ; but only from the time when the right of redemption ceased " (*w*).

*Occupant under deed or will cannot set up statute :—*A party is not permitted to continue in possession under a deed or a will and afterwards say that he acquired the property by a possessory title (*x*).

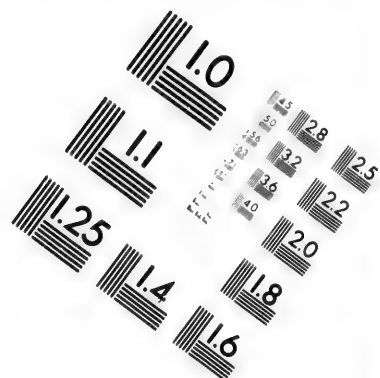
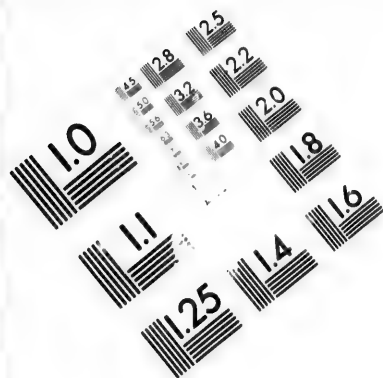
*Onus and costs of proving possession :—*There is a tendency in the courts to throw the costs of proving a title by possession on the party claiming the same. Thus in a case under the Quieting Titles Act, Vankoughnet, C., said : " The rightful owner of the title, which the petitioner or claimant seeks to shut out and extinguish by wrongful possession, may fairly call upon him to establish this. The rightful owner is not to hunt up evidence for the purpose. He cannot tell upon what evidence his adversary may rely to make out such a case, and I do not think he should be made to pay that adversary's costs, even though the latter establish his case " (*y*).

*Boundaries ; their significance in relation to the statute :—*A needlessly large number of cases appear to have arisen on the application of the statute to cases where, owing to errors in surveys, adjoining owners were occupying up to an erroneous boundary line. The confusion

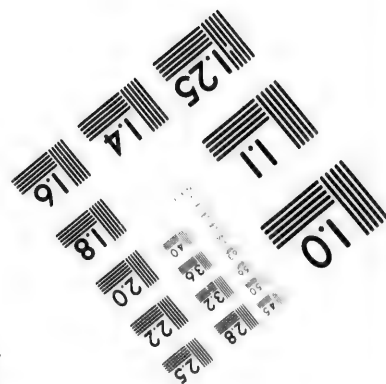
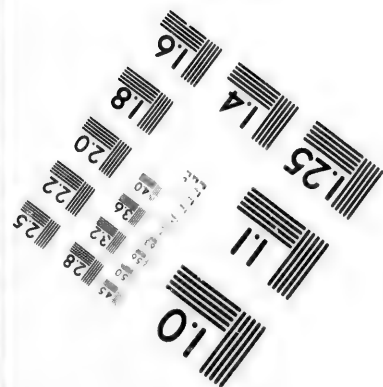
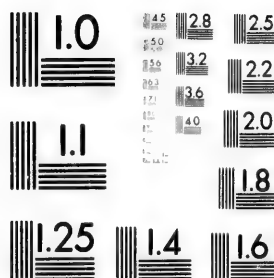
(*w*) *Boyd, C.*, in *Smith v. Midland R. W. Co.*, 4 O. R. 498 (1884).

(*x*) *Gray v. Richford*, 2 S. C. R. 460 (1878), citing *Hawksbee v. Hawksbee*, 11 Hare 230 ; *Austee v. Nelins*, 1 H. & N. 225 ; *Persae v. Persae*, 2 Ir. Chan. R. 196 ; *Keringhan v. McNelly*, 12 Ir. Chan. R. 89 ; *Morton v. Woods*, L. R. 4 Q. B. 293 ; *Archibald v. Scully*, 9 H. L. C. 384.

(*y*) *Low v. Morrison*, 14 Gr. 199 (1868). See *Poole v. Griffith*, 5 Ir. C. L. R. 271, as to onus of proof of commencement of wrongful possession.

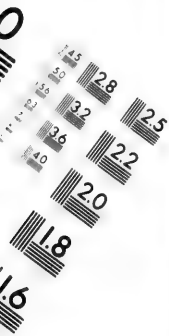


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arose through a supposition that the Survey Act, which provided for establishing the true boundary, interfered with the operation of the Statute of Limitations. That such was not the case, we learn from *Taylor v. Croft* (z), where Wilson, J., says;—"I think the statute (*i.e.*, the Survey Act) does fix the true division lines between the different lots, but notwithstanding that the possession of the parties, which has grown into a title, is not at all affected or defeated by the statute. . . . On this ground, I am of opinion the plaintiff is entitled to maintain his boundary against the true actual and fixed boundary line." Such being the case the question of the true and false boundaries presents no especial difficulty in connection with the statute.

*Boundaries : will erroneous line of fence be extended?*  
—"The general principle I take to be that what a man suffers himself to be actually dispossessed of and excluded from for [twenty] years, he has lost (a); but that he is not to be barred of his right by the Statute of Limitations, in land of which he is the true owner, by any mere constructive possession, resting on an ideal enlargement of a trespass beyond its actual scope" (b).

Nor even if the parties agree to a division line afterwards found to be erroneous, will the possession of a portion, during the statutory period, give a right to the whole, by constructive possession, as if the erroneous line

(z) 30 U. C. R. 579 (1871). See *Bernard v. Gibson*, 21 Gr. 195 (1874); *Palmer v. Thornbeck*, 28 U. C. C. P. 117 (1877); *McCracken v. Warnock*, 43 U. C. R. 214 (1878).

(a) See *Doe Stewart v. Radick*, Tay. 494 (1827); *Doe Dunlop v. Servos*, 5 U. C. R. 518 (1849). Even though there be a mutual error as to the boundary, and no intention on the part of the occupant of obtaining more than the lot covered by the deed, the title will accrue. *Doe Taylor v. Sexton*, 8 U. C. R. 264 (1851); *Martin v. Weld*, 19 U. C. R. 631 (1869).

(b) *Robinson, C.J.*, in *Doe Beckett v. Nightingale*, 5 U. C. R. 518 (1849). See also *Denison v. Chew*, 5 O. S. 161 (1836); *Bell v. Howard*, 6 U. C. C. P. 292 (1857); *Doe Hill v. Sander*, 1 U. C. R. 3 (1844); *Wideman v. Bruel*, 7 U. C. C. P. 134 (1853).

were further produced (c). On the other hand, we must remember that it is not essential that there be any fence at all, to constitute possession (d); but merely that where a fence line is relied on, it must be an actual operative boundary, not an ideal production of one.

*Possession of wild lands*:—The chief difficulty in the application of rules as to possession has, hitherto in Upper Canada, been with reference to wild lands (e), and lands partly cleared, partly uncleared, partly enclosed, partly unenclosed. While the decisions above cited render it manifest that a person in the 1st or 2nd classes enumerated may be in possession of a greater portion of land (wild or otherwise) than he is actually occupying, yet *dicta* are not wanting which render it difficult to define what is covered by the possession of a squatter or mere trespasser. Following Coke's favourite maxim *quod satius est petere fontes, quam sectari rivulos*, we may better refer to cases where the source of the difficulty plainly appears. Thus in *Dundas v. Johnston* (f), Draper, C.J., says: "Land is generally divided by the Government surveyors into uniform lots (g) in each township, except where the irregular formation of the ground owing to lake or river frontage or other causes renders this impossible, and then there are broken lots. The grants from the Crown are also very frequently for less than the lots as surveyed; sometimes, as in the present case, for a half lot, sometimes for a quarter lot; and sometimes a certain number of acres, part of a lot, is granted.

(c) *Ferrier v. Moodie*, 12 U. C. R. 379 (1854).

(d) See *Elliott v. Bulmer*, 27 U. C. C. P. 221 (1876).

(e) "The possession of wild lands will ordinarily be constructive only, following the legal title"; per Patterson, J.A., in *Van Velsor v. Hughson*, 9 A. R. 407 (1882). Cf. *Harris v. Mudie*, 7 A. R. 421 (1882); *Steers v. Shaw*, 1 O. R. 33 (1882); *Walton v. Woodstock Gas Light Co.*, 1 O. R. 630 (1882); *McGregor v. Keiller*, 9 O. R. 681 (1883).

(f) 24 U. C. R. 549 (1865).

(g) Usually 100 or 200 acre lots in the early days.

"As a rule these grants are of land in the natural state, not cleared or improved; at least such is generally the assumed condition when the Crown first agrees to dispose of it to individuals. Even when the grants were preceded by mere locations, subject to the performance of settlement duties, it is notorious that these duties were oftentimes not made at all, or made in a very perfunctory manner, and no part of the land was in fact either cleared, fenced or settled upon, and, notwithstanding the previous condition to perform such duties, the grantee had not, in the language of the 3rd section of Consol Stat. U. C. c. 88, 'taken actual possession by residing upon or cultivating some portion thereof.'

"When, therefore, a person without any title, or without any real or *bona fide* claim of title (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrongdoer can be deemed to have been taken and to be in possession of the whole of such lot,—for example of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division by the original survey; or that his cultivation and fencing of a small part puts him into possession of as much (be it the whole or the fractional part of a lot) as the proprietor of the part trespassed upon owns."

A similar difficulty is raised in *Low v. Morrison* (h), where Vankoughnet, C., says: "The erection of a mill on the corner of a wild lot of land would not be a possession of the whole lot. Many a man, as a squatter or under a pretense of right has availed himself of the advantages which a stream of water affords for driving machinery, and erected a mill there and worked it. But it does not follow from this that he is thereby in possession of the adjacent 200 or 400 acres so as to give a title to them,

(h) 14 Gr. 195 (1863).

adverse to the true title. On which side of the mill, for instance, is the vacant wild land to be considered as in his possession? Is he to be treated as occupying 200 acres in front or in rear, or both, giving him 400 acres in all?"

The difficulty then is, to refer the possession of the squatter on wild lands to any definite quantity of land other than that actually occupied by him; and for cases where this difficulty arises we have the rule restricting the mere trespasser to the land of which he has "pedal possession." As expressed by Haggarty, C.J.: "Where a person enters on part of a wild lot, claiming no title and not affecting to exercise ownership over any specific portion of it building a house and clearing a portion which he afterwards increases, I see little difficulty in rigidly restricting his title by [twenty] years possession to the part actually occupied for such a period" (i).

*When mere trespasser actually occupying a portion may claim whole lot:*—There are cases where a mere trespasser, though actually occupying only a portion of the whole lot may nevertheless claim the whole. Thus, in *Davis v. Henderson*, we find Wilson, C.J., saying:—"If the rightful owner enter upon any part of it, he enters in law upon the whole of it. If, after such entry, another forcibly turns him off and keeps him off for [twenty] years, and during all that time the wrongdoer lives on the land, and cultivates as much of it as he requires, but leaves the half of it in a state of nature, is not this intrusion evidence, without more, of a disseising of the whole lot?"

"So, if another, believing he has rightful title, enters on a lot, claiming to be the owner of it all, lives there for [twenty] years, and clears a part of the land, leaving the rest of it as wild land, is not this, without more, evidence of possession of the whole lot, the wild as well as the cleared

(i) *Heyland v. Scott*, 19 U. C. C. P. 170 (1869). Cf. *Robertson v. Daley*, 11 O. R. 352 (1886).



land? So, if a squatter, who is generally understood to be a person without right or colour of right, enters on land *claiming the whole lot*, and occupies it for twenty years, cultivating part and leaving uncultivated the rest of the lot, taking his firewood and farm timber from it as he requires it, and using it in all respects just as the owner himself would if he were there, and just as all owners usually do use their wild land, is not this evidence of possession of the whole lot, wild land and all?" (j).

*Test of possession of more than actually occupied by mere trespasser*:—For such cases we must have a wider rule than that restricting the mere trespasser to his pedal possession, i.e., to what he has actually occupied. The rule is therefore extended, as we have already seen, to property over which the claimant has exercised continuous and open notorious acts of ownership. Or, as it is more fully expressed by Wilson, C.J., "In my opinion, when any person enters on a lot or half lot, or on any defined piece of land, wild, or partly cleared and partly wild, under colour of right or otherwise, and holds possession for the statutable period, the question for the jury should always be, as to the wild land, whether the person whose possession is in question has claimed or held the wild land (for there is no misunderstanding as to the cleared land) as owner, and has used it in like manner as the owners of lands, who have uncleared and unenclosed portions on the lots they occupy, usually use their wild lands, by such acts of ownership as owners are accustomed to exercise, or whether the acts of the person in question have been the acts of a mere trespasser, not done and not intended to have been done in the assertion of right, title or ownership (k).

*Mere trespassers must at least have exercised continuous and open acts of ownership*:—"In cases of what is well

(j) Davis v. Henderson, 29 U. C. R. 353 (1869).

(k) *Ib.*

(l)  
McMas  
(m)

understood in the country by the term 'squatters,' I have always thought that as against the real owner they acquire title by [twenty] years occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession (*l*).

*What constitute acts of ownership of wild land :—*

Some of the acts that go to make up a complete exercise of ownership are enumerated by Wilson, C.J., in the following passage : — "Now, how is wild land to be possessed? It is settled that it need not be enclosed. What better test can there be of its possession, than that the person whose possession is questioned should have used it just the same as any other owner uses his wild land, by asserting title to it, by giving licenses to cut timber from it or to pass over it, by excluding others from cutting or travelling over it, by cutting over it himself at his pleasure, by preserving the timber upon it, though he never has cut a stick himself, or by any other acts or evidence from which it may fairly be presumed he has taken the possession of the woodland as well as of the cleared" (*m*).

"It may be said that he ought to do some act, such as fencing the lot on all sides; yet if he did put a brush or other fence round the whole one hundred or two hundred acres it would only be evidence for a jury that he claimed and held possession of the part fenced. It seems to me that actual possession of a lot partly cleared and partly uncleared, as in the case before us, can only be evidenced by the actual exercise of such right and

(*l*) Draper, C.J., in *Dundas v. Johnston*, 24 U. C. R. 550 (1865). Cf. *McMaster v. Morrison*, 14 Gr. 143 (1867), *per* Mowat, V.C.

(*m*) *Davis v. Henderson*, 29 U. C. R. 356 (1869).

dominion over the whole as a true owner would visibly exercise himself, and that it is for a jury to say whether from the circumstances attending such occupation they are satisfied that the party claiming was in possession of the land in question" (n).

"As to the statute not running with respect to the wild land, I am of opinion that when a party goes into possession of a lot of land which has been granted by the Crown, on which he clears and puts his fence from time to time as he may require to protect his clearings, and uses the bush land for the purpose of taking firewood, making sugar, and cutting timber as he thinks proper, and using it as the owners of such lands in the neighbourhood use their bush land, although such bush land may not be actually inclosed by a fence, it is, nevertheless, drawn to the possession of the rest of the lot, and possession of part becomes possession of the whole. I do not consider that this view conflicts at all with the cases decided in relation to dispute boundaries, when it is attempted to extend an assumed conventional line on the naked possession of a part inclosed within a fence, to a part of the lot which has never been inclosed, and which parties cannot know was ever intended to be inclosed" (o).

Doing such acts as above mentioned "and in various other ways exercising ownership, and doing other acts in relation to the whole lot consistent with or only referable to the occupier's supposed title and ownership—such acts would be evidence to go to the jury that for such period the person so living on and so dealing with the land was in actual possession of the whole one hundred or two hundred acres" (p).

(n) Morrison, J., *ib.* at p. 358.

(o) Richards, J., in *Wigle v. Merrick*, 8 U. C. C. P. 325 (1859). Cf. *Allison v. Rednor*, 14 U. C. R. 468 (1857).

(p) Morrison, J., in *Davis v. Henderson*, 29 U. C. R. 358 (1869).

*Employing a caretaker to protect the property is a sufficient act of [ownership]:—*"The proposition here is, whether a possession of part by a caretaker, expressly employed to protect the whole, on behalf of one claiming such whole by a paper title (afterwards shown to be defective) and who does accordingly protect it from all other intruders, can or cannot establish a statutory possession . . . We are not prepared to hold that unenclosed woodland in this country can never be the subject of a [twenty] years possession. If fencing and cultivation can alone constitute a possession, then title to open woodland can never be acquired against the true owner. To put an extreme case, if a man posted caretakers or sentries every day to patrol the bounds of an unfenced lot, rigidly driving off all trespassers and thus preserving the whole for the exclusive use of their employer, could it still be said that twenty years of such proceedings would not bar the true owner? If this can confer a possessory title, then the question becomes one of degree" (q).

*Depredations are not acts of ownership:—*"If he were residing on part of the lot under a title valid or otherwise to the whole, so that we can clearly see he was claiming the whole, the case would be different; but if having permission only given to him to occupy the west half, he did confine himself to that half, so far as residence and cultivation went, and only committed depredations as a stranger might do on the other half, we cannot hold him to have had exclusive possession of both halves" (r).

"No case was cited for the position that such acts which, unless a license be shewn, would be nothing more or less than several and distinct acts of trespass, are to be

(q) Hagarty, C.J., in *Heyland v. Scott*, 19 U. C. C. P. 172 (1869).

(r) Robinson, C.J., in *Doe d. McDonell v. Rattray*, 7 U. C. R. 326, (1850); cf. *Wishart v. Cook*, 15 Gr. 238 (1863); *Low v. Morrison*, 14 Gr. 195 (1868), case of a mill erected on corner of lot of wild land. Cf. *Ashton v. Stock*, 6 Ch. D. 719 (1877), owner of mine taking coals from his neighbor's mine.

regarded in the same light as an actual enclosure, or an actual occupancy, or *possessio pedis*, which being definite, positive, and notorious would put an actual owner on his guard" (s).

"To enable the defendant to recover he must show an actual possession, an occupation exclusive, continuous, open or visible and notorious for [twenty] years. It must not be equivocal, occasional or for a special or temporary purpose . . . The acts relied on were nothing more, as against the true owner, than isolated acts of trespass having no connection one with the other. The mere acts of going on wilderness land from time to time in the absence of the owner, and cutting logs or poles, are not such acts, in themselves, as would deprive the owner of his possession. Such acts are merely trespasses on the land against the true owner, whoever he may be, which any other intruder might commit. There was no occupation of the lot by the defendant; there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun" (t).

*Dispossession or discontinuance of possession* :—"Dispossession and discontinuance of possession are not both required by the statute, the expressions are used disjunctively, and there is no doubt that it may happen in cases under the statute that one may by discontinuance have lost his right, when at the same time no other person can be said to have acquired a right to the property by possession against him (u). That may lead to consequences perhaps not foreseen or intended by the legislature; but it is a consequence noticed by English commentators on the statute; not, however, as a circumstance which can prevent

(s) *Donovan v. Herbert*, 12 A. R. 311 (1885), *Burton, J.A.*

(t) *Ritchie, C.J.*, in *Sherren v. Pearson*, 14 S. C. R. 586 (1887), approving *Doc d. Desbarres v. White*, 1 Kerr N. B. 595 (1842).

(u) It must be borne in mind, however, as we shall see, that discontinuance must be begun by the possession of another than the party discontinuing.

an operation of the statute as a bar in a clear case of discontinuance of possession. It would lead to great inconvenience, if a person who had sold a lot of land in parcels could come after [twenty] years, and claim the benefit of a few inches, or a few feet of surplus unknown to any one, and intrude himself between adjacent properties" (v).

*Distinction between dispossession and discontinuance.*

—Dispossession *ex vi termini* implies the actual entry of some one. It is the act of another. Discontinuance is one's own act. It does not signify merely ceasing to occupy, for the constructive possession will in such a case continue: *Smith v. Lloyd*, 9 Ex. 562. But I can easily understand that there may be a discontinuance of one's constructive possession and some act or admission, short of the creation of a legal title, which may transfer the constructive possession to another who does not enter into actual occupation. What conduct would suffice to produce this effect must in every case be decided upon the facts presented. For examples, I may refer to *Pringle v. Allan*, 18 U. C. R. 575, where the subject is discussed by Burns, J., and to the judgment of the present Chief Justice of this Court, in *Mowatt v. Walker*, 15 Gr. 155" (w).

*Essential features of discontinuance:*—"The word 'discontinuance' I understand to mean an abandonment of possession by one person followed by the actual possession of another person. This, I think, must be its meaning, for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the

(v) *Per Robinson, C.J.*, in *Doe d. Taylor v. Proudfoot*, 9 U. C. R. 507 (1852).

(w) *Patterson, J.A.*, in *Van Velsor v. Hughson*, 9 A. R. 407 (1882). Cf. the distinctions suggested in *Rains v. Buxton*, 14 Ch. D. 537 (1880).

right, and actual possession, whether adverse or not, to be protected" (x).

"There is no dispossession, discontinuance of possession, discontinuance of receipt (y) of the rents and profits until some one has commenced a possession or receipt incompatible with the true title" (z).

"In deciding whether there has been a discontinuance of possession, the nature of the property must be looked at. I am of opinion that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment" (a).

*Lack of actual possession does not amount to discontinuance* :—"The mere fact of the holder of a good paper title not having been in actual possession by himself or tenant for [twenty] years, has never been held by us to bar his title; because, while he holds a good title uncontested by any one—and there is no other ground for imagining that he has abandoned his interest than the mere fact of his not having resided on and improved his land—this cannot be reckoned a discontinuing of possession within the meaning of the statute" (b).

*But there may be discontinuance of constructive, as of actual possession* :—"The view I take of the Statute of

(x) Blackburn, C.J., in *McDonnell v. McKinty*, 10 Ir. L. R. 526, quoted by Armour, J., in *Walton v. Woodstock Gas Light Co.*, 1 O. R. 637 (1882). Cf. *Ketchum v. Mighton*, 14 U. C. R. 101 (1856), citing *Smith v. Lloyd*, 9 Ex. 562. See also *Lloyd v. Henderson*, 25 U. C. C. P. 256 (1875); *Beigle v. Dake*, 42 U. C. R. 250 (1877); *Griffith v. Brown*, 5 A. R. 313 (1880); *Rains v. Buxton*, 14 Ch. D. 539 (1880); *Howlin v. Sheppard*, 19 W. R. 253, possession must be by person claiming under statute.

(y) See *Adnam v. Earl of Sandwich*, 2 Q. B. D. 485 (1877), for question how far receipt of rent from another than the terre-tenant constitutes a discontinuance. See further as to discontinuance of receipt, *Owen v. De Beauwood*, 16 M. & W. 547; *Irish Land Commission v. Grant*, 10 App. Cas. 27; *Denys v. Shuckburgh*, 4 Y. & C. 42, *McDonnell v. McKinty*, 10 Ir. L. R. 514, rent of mines; *Woodcock v. Titterton*, 12 W. R. 865, rent charge.

(z) *Sullivan, J.*, in *Doe Cuthbertson v. McGillis*, 2 U. C. C. P. 142 (1852); Cf. *Workman v. Robb*, 7 A. R. 389, 411 (1882); *Jessup v. G. T. R. Ry. Co.*, 28 Gr. 583, 7 A. R. 128 (1882).

(a) *Leigh v. Jack*, 5 Ex. D. 274 (1879).

(b) *Per Robinson, C.J.*, in *Doe d. Taylor v. Proudfoot*, 9 U. C. R. 506 (1852).



Limitations is that it operates upon constructive possessions as well as upon actual possession. . . . There may be acts, I think, quite as unequivocal in regard to constructive possession as of those which are actual" (c). Accordingly, in a case where the plaintiff, living near the land and knowing all about it, on a person who claimed it, asking him to point it out, did so, and on being asked by such claimant to buy it, stated that he was willing to do that, but had not then the means, it was said by Burns, J.—"It seems the plaintiff knew perfectly well at that time how matters stood with regard to the land, and one cannot help considering it rather strange that he should want to buy his own land, or if he considered himself, in any sense of the word, in possession, either actual or constructive, that he should not then have told the person who came to him that the land was his own, or that he had possession of it. This evidence, it seems to me, would have been proper evidence to submit to the jury, to consider whether the plaintiff had or not abandoned or discontinued the possession which the law would have cast upon him at the death of his father, if the patentee had made no legal conveyance" (d).

*Discontinuance of constructive possession should be evidenced by some overt or distinct act:—*"His is not like the case of one having actually occupied, deserting or abandoning the premises without the *animus revertendi*, like a tenant when time has expired, or a mere trespasser or squatter without title going off and relinquishing possession; but his is like the case of a government grantee or a purchaser of uncultivated lands not in actual possession, and whose constructive possession derived under the government patent or deed of conveyance is presumed to continue until it is proved to have been disturbed or put an end to by actual entry of a stranger, or by his discon-

(c) Burns, J., in *Pringle v. Allan*, 18 U. C. R. 583 (1859).

(d) *Ib.*

tinuing such possession by some overt or distinct act evincing the intention so to do" (e).

The owner who has never been in actual (as opposed to constructive) possession is in rather a better position than one who has; for it is not easy to say that he has been dispossessed (f), and it is harder to shew a discontinuance of a constructive than of an actual possession.

*Actual possession discontinued by departure without the animus revertendi*:—Where an owner fled from the province in 1814 under a charge of treason, Robinson, C.J., said of him:—"It would have been proper, it appears to me, in such a case to conclude that his mind was made up when he was still in this province, and that his discontinuance of possession was with no view of ever resuming it" (g).

*Evidence of dispossession should be unequivocal*:—Where the children of the survivor of two tenants in common claimed a property to the exclusion of the children of the other co-tenant, Robinson, C.J., said:—"It may be that C. A. . . . did entertain the idea before 1836 that he could contest the right of his brother's family to any portion of the lot, and to keep the whole himself; but if he meant to take that part, he should have acted in an unequivocal manner, such as could not take the other parties by surprise. They should not have been left to suppose that he was still recognizing their right, and holding the rents and profits as their guardian. His being in possession of the mills and the land gave them no warning, because being at least tenant in common, he had as good a right to be in possession as they had, and his position as guardian would account for his being in possession of all the property. He ought by an actual ouster,

(e) Macaulay, C.J., in *Doe Cuthbertson v. McGillis*, 2 U. C. C. P. 13 (1852), case of absence from province.

(f) *Doe d. Shepherd v. Bayley*, 10 U. C. R. 310 (1853).

(g) *Butler v. Donaldson*, 12 U. C. R. 255 (1855).

or by some act equivalent, as by an avowed receipt and holding of all the rents and profits on his own account to have given them to understand that he had changed his character and pretensions, and was holding independently of their right and of his office of guardian" (h).

*No dispossession of undivided moiety* :—"In *Reading v. Royston* it is thus said in 2 Salk. 423: The Statute of Limitations never runs against a man, but where he is actually ousted or disseised . . . and where two men are in possession, the law will adjudge it in him that hath the right. A man may be tenant in common by prescription yet he may not be tenant in common by wrong; nor can a man be disseised of an undivided moiety" (i).

*Statute runs until dispossessed owner restored to possession* :—"When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will" (j).

5. (2) Where the person claiming such land or rent claims the estate or interest of some deceased person, who continued in such possession or receipt in respect of the same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

On a batement or death.  
Imp. Act, 3-4 Wm. IV. c. 27, s. 3.

"When the claim is of the estate of a deceased person in possession at his death, being the last person entitled who

(h) *Ingalls v. Arnold*, 14 U. C. R. 304 (1857).

(i) Cited by Rose, J., in *Arnold v. Cummer*, 15 O. R. 384 (1888).

(j) *Day v. Day*, L. R. 3 P. C. 761 (1871).

shall have been in possession, the period of accruer is the death of such person. Thus, where A., seised in fee in possession, dies either intestate leaving B. his heir, or having devised to B. in fee or for a less estate (*k*), and C., a stranger first obtains possession after the death of A., the time runs against B. from A.'s death and not from C.'s entry" (*l*).

On alienation.  
Imp. Act,  
3-4 Wm. IV.  
c. 27, s. 3.

5. (3) Where the person claiming such land or rent claims in respect of an estate or interest in possession, granted, appointed or otherwise assured by any instrument other than a will, to him or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument has been in possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

"Other than a will":—See *James v. Salter*, *supra*.

*Cestui que trust in possession*:—See *Garrard v. Tuck*, 8 C. B. 231; *Doe v. Phillips*, 10 Q. B. 130.

As to  
lands not  
cultivated  
or im-  
proved.

5. (4) In the case of lands granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such grantee or such person claiming under him, while entitled to the lands, had knowledge of the same being in the actual possession of such other person, the lapse of ten years shall not bar the right of such grantee, or any person claiming under him to bring an action for the recovery of such land, but the right to bring an action shall be deemed to have accrued from the time that such knowledge was obtained: but no such action shall be brought or entry made after twenty years from the time such possession was taken as aforesaid.

Proviso.

Under the present sub-section we may conveniently consider, how far the Crown is affected by the Statute of Limitations, both generally and with respect, particularly

(*k*) But see *James v. Salter*, 3 Bing. N. C. 554 (1837).

(*l*) *Hayes' Conveyancing*, Vol. I. p. 248. See further *Baines v. Lumley*, 16 W. R. 674, tenancy year to year, rent not governed by this sub-section.

to waste lands; also how far the present sub-section affords protection to the grantees, or, as they are usually called, patentees, of such lands.

*How far Crown may set up Statute of Limitations:—*  
R. S. C. c. 136, "The Petition of Right Act" has the following provision:

8. The statement of defence or demurrer may raise, besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject; and any grounds of defence which would be sufficient on behalf of Her Majesty may be alleged on behalf of any such person as aforesaid. 39 V. c. 27, s. 8.

Under this section it is clear that the Crown may, in proceedings by petition of right, claim the benefit of The Statute of Limitations (*m*).

39 V. c. 27, was passed in 1876, previously to which there was considerable doubt as to the right of the Crown to set up the statute. The matter is discussed in *McQueen v. The Queen* (*n*), by Strong, J., who says: "I have considered the case of *Rustomjee v. The Queen* (*o*), holding that The Statute of Limitations of James I. was not a defence which the Crown could set up to a petition of right. That case is, however, clearly distinguishable from the present in these important respects. The English Petition of Right Act, 1860, which applied to the case of *Rustomjee v. The Queen* contains no provisions similar to the 7th section of the Canadian Act just set out. Further, it appears to me to be questionable whether the decision in *Rustomjee v. The Queen*, which related to a quasi personal demand against the Crown, the remedy for which, not the right itself, would be alone barred by The Statute of Limitations applicable to it in the case of a subject would

(*m*) *Per Ritchie, C.J.*, in *McQueen v. The Queen*, 16 S. C. R. 60 (1887).

(*n*) *Ib.* at p. 81.

(*o*) 1 Q. B. D. 48

apply at all to a claim to recover land where not merely the remedy but by the express words of the Act, the "right and title" of the claimant that is his right and title against all the world, became extinguished at the expiration of the statutory period."

*Crown not barred by Statute of Limitations* :—"Our Statute of Limitations in regard to real property, 4 Wm. IV. c. 1, does not bind the Crown (*p*), nor has any legislative provision that I am aware of been made in Upper Canada, or in Canada since the union, placing any limitation upon the Crown in respect to the time within which its title to real property must, under any circumstances, be asserted" (*q*).

*Crown not barred even though a trustee* :—"I think I am bound by *Regina v. Williams*, 39 U. C. R. 397, expressly deciding that the Crown is not barred though a trustee (*r*).

*Extent of rule excepting Crown from operation of Statute* :—"The principle . . . was to be found everywhere uniformly stated and plainly recognized, that the king could not be dispossessed; that an intruder upon the Crown consequently gained no estate or interest by his possession; that the Crown could grant the land as freely as if no such intruder were upon it; and that the grantee of the Crown in such a case, would by force of his grant be seised of an estate in possession in the eye of the law" (*s*). Accordingly it is not necessary in case of a person being in adverse possession that the Crown should proceed by information of intrusion before granting the lands to a

(*p*) Cf. *Doe West v. Howard*, 5 O. S. 464 (1837).

(*q*) *Regina v. McCormick*, 18 U. C. R. 133 (1859). See also *Queen v. Sinnot*, 27 U. C. R. 539 (1868); *Regina v. Williams*, 39 U. C. R. 399 (1876).

(*r*) *Boyd, C.*, in *Attorney-General v. Midland R. W. Co.*, 3 O. R. 521 (1882).

(*s*) *Doe Fitzgerald v. Finn*, 1 U. C. R. 79 (1844).

patentee or that the grant should specially convey the Crown's right of entry on the land to the grantee (*t*).

*Crown must divest itself of the fee before statute can run* ;—Where one of two lessees of the Crown encroached on the land of the other, each being supposed to have one half lot, and after more than twenty years of such possession they obtained patents for the respective half lots, the question arose did the possession of the encroaching party bar the other: "The statute did not begin to run till the Crown had divested itself of the fee. . . . It is impossible for us to hold that an encroachment by one tenant for years upon another tenant for years, both holding under lease from the Crown, can have had any effect under the Statute of Limitations upon the title to the fee. The rights of the Crown were in no way interfered with by such encroachment" (*u*).

*What Limitations as against the Crown?*—By an Act passed in the reign of George III. and generally known as the *Nullum Tempus* Act (*v*) it was enacted that the Crown should not thereafter bring action against any person or body for or concerning any lands, etc., or the profits thereof, by reason of any title not first accrued within the space of sixty years next before the bringing of such action; unless the Crown (or those through whom the Crown claims) should have been answered (*w*) the rents, etc., by virtue of such title, or the same should have been *duly in charge* to the Crown or have stood *insuper of record* (*x*).

(*t*) *Ib.* See also *Hill v. McKinnon*, 16 U. C. R. 216 (1858).

(*u*) *Per* Robinson, C.J., in *Jamieson v. Harker*, 18 U. C. R. 593 (1859). Affirmed in *Dowsett v. Cox*, *Ib.* p. 594.

(*v*) 9 Geo. III. c. 16.

(*w*) To answer means to become the debtor of, not necessarily to pay *Stroud's Jud. Dict.* 39.

(*x*) *In super*: debiting or charging a person in an account. *Exchequer term*: *Wharton, Law Lexicon*, 423.



"At common law, we have the maxim, *Nullum Tempus occurrit regi*, which would leave the Crown at liberty to pursue its remedy, by action or information, at any distance of time . . . We have only to consider the *Nullum Tempus* Act of 9 Geo. III. c. 16, which was passed because the operation of the statute of James I. (y) was spent. That Act, I have no doubt, must be held to be in force here, under our general adoption of the law of England in all matters relative to property and civil rights, by our statute 32 Geo. III. c. 1, although the king is not named in the last mentioned statute" (z).

*Nature of claim under Nullum Tempus Act*:—"Under the statute 9 Geo. III. c. 16, occupants do not from the mere lapse of time, acquire a title, as they might under our statute 4 Wm. IV. c. 1, by occupying lands owned by individuals for more than [twenty] years, without payment of rent or written acknowledgment of title (a). The effect of the statute of Geo. III. is simply that the Crown is barred; and that will only be the case where the possession appears to have been adverse, and by a party claiming title, and not entering as a mere trespasser. . . . Some proof, I think, should be given in any such case that the possession has been adverse to the Crown, and not permissive, and has not been a mere continued possession taken in the first instance by a mere intruder not asserting title" (b).

*To what cases Nullum Tempus Act applies*:—"To enable us to apply the statute 9 Geo. III. c. 16, the case should be one in which the Crown might in the nature of things have had it in its power to set up in its favour

(y) 21 Jac. I. c. 2.

(z) *Regina v. McCormack*, 18 U. C. R. 133 (1859). See also *Queen v. Sinnott*, 27 U. C. R. 539 (1868); *Regina v. Williams*, 39 U. C. R. 399 (1876).

(a) Cf. *Watson v. Lindsay*, 6 A. R. 618 (1881).

(b) *Robinson, C.J.*, in *Regina v. McCormick*, 18 U. C. R. 134 (1859), citing *Doe Wm. IV. v. Roberts*, 13 M. & W. 520.

one or other of the exceptions contained in the statute, namely: that within the sixty years His Majesty or his successors had 'by force or virtue of his right or title to the land been answered the rents, issues, or profits of the land'; or that the land 'had within that time been duly in charge to His Majesty, or some of his predecessors, or shall have stood *in super* of record within the space of sixty years.' It is only, I think, in regard to lands of which that might be predicted that this statute can have been intended to apply" (c).

*Nullum Tempus Act does not apply to waste lands of Crown*:—"Looking at the two statutes of Upper Canada with respect to the public lands, 2 V. c. 15, and 12 V. c. 9, and others also, I do not think the legislature contemplated the Act of 9 Geo. III. c. 16, to be applicable in Upper Canada to lands for which there had been no grant, lease, ticket, either of location or purchase, or letter of license or occupation. In the provisions of these Acts no time is contemplated when the Crown would be barred from taking the summary remedy provided in the two specially mentioned. . . . I have no doubt we must consider the Act called *Nullum Tempus Act*, as part and parcel of the law of this province, so far as affecting lands, the rents, revenues, issues or profits of which the Crown has taken or received, or where the lands can be said to have been duly in charge at some period, so that the Act would apply; but with regard to the public waste lands vested in the Crown, I take it they must be looked upon as at common law, without being bound by that statute (d).

*Present provision as to waste lands*:—"It being settled that the Crown is not affected by the statute, it remained to extend a further protection to patentees of the Crown in cases where it would be difficult for them to

(c) *Id.*(d) *Id.*, per Burns, J.

protect their purchased lands from unseen squatters. The improvement in this respect brought about by the present sub-section is discussed by Mr. Justice Gwynne, in *Mulholland v. Conklin* (e), as follows :—

“ Before the statute [twenty] years adverse possession was a bar, whether the grantee of the Crown, or any person claiming under him, had knowledge of that fact or not, and whether the land had been entered upon by the grantee of the Crown, his heirs or assigns or not ; whether it was wild, uncleared land or not ; but the statute comes in, and says, in respect of wild land, upon which the grantee of the Crown, his heirs or assigns had not actually entered, by residing upon or cultivating some portion thereof, the lapse of [twenty] years shall not bar the right of the grantee of the Crown, his heirs or assigns, unless it can be shown that the grantee, or person claiming under him, *while entitled* to the lands, *had* knowledge of the same being in the actual possession of such other person ; but the right to bring the action will be deemed to have accrued from the time that such knowledge *was* obtained.”

*The patentee not considered as disseised* :—The effect of a case coming within the present section, the patentee having had no knowledge of the occupation by another, is “ not merely that a [twenty] years’ possession held by another does not bar him, but that during the time that he is without knowledge of his land having been taken possession of, he is not to be regarded as disseised, and consequently is in a condition to devise ” (f).

*Patentee protected even though ignorant of his ownership* :—“ This provision, which will in general operate

(e) 22 U. C. C. P. 382 (1872) ; Cf. *Re Linet*, 3 Chy. Ch. 230 (1871) ; *McMaster v. Morrison*, 14 Gr. 142 (1867). The statute now makes twenty years the *extreme* limit instead of forty years, which was the limit at the time of the above decision.

(f) *Doe McGillis v. McGillivray*, 9 U. C. R. 12 (1852).

justly in cases of mere trespassers, pretending no right occupying wild lands without knowledge of their owners, has a hard operation in the case like the present—where, in the first place, the parties who have been all the time occupying were *bona fide* purchasers holding under deeds which they supposed gave them a good title, and where the patentee did not by himself, his servants or agents, take possession of the land, because he tells us himself he was not aware he owned it. He was not, like the owners of wild land, reposing on the goodness of his title, assuming that no one would take possession of it wrongfully, and therefore not putting himself to the trouble (which the statute excuses him from) of exploring the wilderness to see whether it has continued unoccupied" (g).

*What constitutes "actual possession" by the grantee:—*

"Where the patentee built the house on the land granted to her, and occupied it, and cleared and cultivated the part so cleared for several years, she was, in my opinion, in the words of the statute 'in the actual possession by residing upon or cultivating some portion thereof.' She had the actual possession of all the land she had the title to. She did not enter only into the part she built upon and cultivated, she entered into every part of the lands granted to her.

"If a grant had been made to her of two different lots, I would not say, although they joined each other, that the entry upon one lot and taking actual possession of it was a taking possession of the other lot. There might also be some difficulty in saying whether, if the grant of a lot were made by the description of half lots, the entry upon one half lot would be the entry upon the other half lot as well, to affect the grantee by the enactment referred to. That would depend upon whether the grantee claimed to enter

(g) *Doe Pettitt v. Ryerson*, 9 U. C. R. 280 (1852); followed in *McMaster v. Morrison*, 14 Gr. 142 (1867).

upon the whole lot, and exercised the like acts of ownership over it by cutting timber on it, or by selling timber from it, and the like, or by fencing it on some part or parts of it, just as other proprietors did or usually do in the like case.

"While it may be difficult to say whether the grantee has taken actual possession of the whole of his granted lands when the grant is of a large quantity, such as two or more lots, merely because he has built upon or cultivated some part of his whole grant, it is less difficult to say so, when he is the grantee of a smaller piece of land such as a single lot or half lot, whether his building upon or cultivating 'some portion thereof' is a taking of the actual possession of the whole land which has been granted to him, and that difficulty would be more and more removed by the reduction of the extent of the grant until at some particular amount of acreage it would wholly disappear" (*h*).

"*Actual possession must be subsequent to patent*" :—It seems that the possession must be subsequent to the patent to exclude the patentee from the benefit of this sub-section. Thus, in *Stewart v. Murphy* (*i*), B. went upon the land to perform settlement duty, and then conveyed to H., from whom the plaintiff claimed. B. then left the country, after which the patent was issued in his name. It was held that the plaintiff was not excluded from the benefit of this provision by the occupancy of B. It was also considered very doubtful if such occupancy for the mere purpose of settlement duty, even after the patent, would have excluded the plaintiff.

*Onus of proof that patentee ever in possession* :—The onus is on the defendant in ejectment to show "that the grantee of the Crown, or any one under him, ever actually

(*h*) *Beigle v. Dake*, 42 U. C. R. 259 (1877).

(*i*) 16 U. C. R. 224 (1858).

occupied, or had notice of any other occupant being in possession" (j).

"Some other person not claiming to hold under such grantee:—"The case provided for is where a person not claiming under the grantee takes possession of wild land without the knowledge of the grantee or those claiming under him. The case before us is just the opposite in its complexion. . . . The patentee's vendee, having a perfect paper title, entered into actual possession, and has held it for [twenty] years after the right of entry now sought to be enforced first accrued to the plaintiff. . . . The Statute of Limitations has barred that right of entry" (k).

*The grantee claimed under must be the true grantee:—*"The plaintiff says, 'I took possession of the land, claiming under the grantee: my title by possession began then; for the exception is "in case some other person not claiming to hold under such grantee has been in possession of such land"; and it does not apply to me.' This appears plausible, but it is more ingenious than sound; for, as the fact was, he took possession of the land claiming it under one who was not the grantee of the Crown, as the jury have found" (l).

"While entitled to the lands":—Where the only knowledge shown was in the devisee and widow of a person who held a bond for a deed from the owner, this was held insufficient: "unless the widow . . . is shown to have had such a title as would give a right of entry on any person in possession, her knowledge must be immaterial" (m).

(j) *Doe McKay v. Purdy*, 6 O. S. 145 (1841). As to what constitutes evidence of such possession, see *Armstrong v. Stewart*, 25 U. C. C. P. 198 (1875); *Young v. Elliott*, 23 U. C. R. 420 (1864).

(k) *Hagarty, J.*, in *Cushing v. McDonald*, 26 U. C. R. 609 (1867).

(l) *Turley v. Williamson*, 15 U. C. C. P. 541 (1865).

(m) *Johnson v. McKenna*, 10 U. C. R. 524 (1853). As to knowledge of husband seized in right of his wife, see *Harris v. Prentiss*, 30 U. C. C. P. 491 (1880); 7 A. R. 414.

*Lease of Crown lands or timber limits :— See Muskoku Mill and Lumber Co. v. McDermott (n).*

When rent amounting to \$4 reserved by lease in writing has been wrongfully received, right deemed to accrue at the time the rent was wrongfully received.  
Imp. Act, 3-4 Wm. IV. c. 27, s. 9.

5. (5) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing by which a rent amounting to the yearly sum of \$4 or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease has afterwards been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

“*Wrongfully claiming*” :—“Wrongfully” may refer to a mistaken claim as well as to an intentional claim : “the other argument that—the word ‘wrongfully’ excludes the receipt by mistake, or any matters of that description, and must mean an intentional and improper claiming of the rent—I reject altogether ; and I am satisfied that it is not the true construction of the statute. It means a person not entitled, who makes a claim to the rents against the person who is entitled” (o).

*Meaning of “rent” in this sub-section* :—“The word ‘rent’ is there used seven times. The first time it means rent charge ; the second and third, rent reserved, the fourth, rent charge ; the fifth, rent reserved ; the sixth, rent charge ; the seventh rent reserved” (p).

(n) Court of Appeal, April, 1894, no prescriptive right to renewal of lease.

(o) Lord Romilly, M.R., in *Williams v. Pott*, L. R. 12 Eq. 152 (1871).

(p) *Angell v. Angell*, 9 Q. B. 328, 356 (1846). Cf. *Baines v. Lumley*, 16 W. R. 675.



*Old law of limitations as to leases* :—In *Doe Cook v. Danvers* (q), where more than twenty years had elapsed since the last payment of rent, but not since the determination of the lease, it was held that the Statute of Limitations then in force (21 Jac. I., c. 16) did not apply.

*Time when right accrues under this section* :—"When is the right to recover possession of land, subject to a lease, to be considered as having accrued? Not from the time when any person dealing with the leases or dealing with those who are entitled to the leases, gets possession, and claims to be entitled in fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease; for then the adverse title of the person who receives the rent under such circumstances is first really brought into operation against the party who claims on the expiration of the lease" (r).

*Tenant setting up title adverse to his landlord's* :—"If a tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term: and it is the same if he assists another person to set up such a claim" (s).

*Wrongful perception of rents by executor or agent* :—Where an executor, acting under a void devise, collected rents and paid them over to J. for more than ten years, Boyd, C., said :—"At the testator's death, the persons rightfully

(q) 7 East, 299 (1806). Cf. *Cholmondeley v. Clinton*, Turn. & Russ. 118 (1823), for rule in equity; *Taylor v. Horde*, 1 Burr. 60, *Magdalen Hospital v. Knotts*, 4 App. Cas. 324, as to void lease.

(r) *Chadwick v. Broadwood*, 3 Beav. 316 (1840). Cf. *Twiss v. Noblett*, 1 R. 4 Eq. 60; *Archbold v. Scully*, 9 H. L. C. 360. See further *Sloane v. Flood*, 5 Ir. C. L. 75; *Shaw v. Keighron*, 1 R. 3 Eq. 574; *Drew v. Norbury*, 3 J. & Lat. 306, as to wrongful receipt.

(s) *Doe Ellerbrock v. Flynn*, 1 C. M. & R. 137, 141 (1834). See further *Doe v. Wells*, 10 Ad. & Ell. 427 (1839), mere oral disclaimer of landlord's title no cause of forfeiture; unless a direct repudiation or claim involving such; *Doe Gray v. Stanton*, 1 M. & W. 703 (1836), citing *Doe v. Pasquali*, Peake, 196; see also *Doe v. Cooper*, 1 M. & G. 135; *Rees v. King*, Forrester, 19; attornment to another, see *Hoveden v. Ammesley*, 2 Sch. & Lef. 607, 624 (1806); *Meredith v. Gilpin*, 6 Price, 146; expiry of lessor's title, *Downs v. Cooper*, 2 Q. B. 256 (1841); *Fenner v. Duplock*, 2 Bing. 10 (1824).

entitled to collect the rents were the heirs-at-law. The perception (*t*) of these rents by the executor was from the outset 'wrongful' within the meaning of the statute (*u*); *Williams v. Potts*, L. R. 12 Eq. 149. The collection of the rents by the executor and the payment of them to J. was in effect a possession of the land by J., in favour of whom the statute would run" (*v*).

*Distinction between wrongful perception and allowing lessee to neglect payment* :—"Now, when did the statute begin to run? On the non-payment of the rent, or at the end of the lease? If the rent had been paid to any one so that E. and his heirs had been disseised of the rent, the statute would begin to run from that time; but no rent was paid, and the statute only ran as against E. and those claiming under him from the termination of the lease. . . . The case falls within the latter branch of the third section (*w*), which in the case of an estate in reversion provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession" (*x*).

*Encroachments by tenant* :—A tenant taking in land adjacent to his own by encroachment must as between himself and his landlord be deemed *prima facie* to take it as part of the demised land; but that presumption will not prevail for the landlord's benefit against third persons: so that possession by the tenant of adjacent land will not enure to create a title for the landlord (*y*).

(*t*) "Perception": L. percipere, to take wholly or entirely. See 2 Bl. Com. 163; *Kountze v. Omaha Hotel Co.*, 107 U. S. 393 (1882).

(*u*) The present sub-section.

(*v*) *Hopkins v. Hopkins*, 3 O. R. 232 (1883).

(*w*) Of 3 & 4 Wm. IV. c. 27 (Imp.), now sub-section 11, *infra*.

(*x*) *Liney v. Rose*, 17 U. C. C. P. 188 (1886), citing *Doe Davey v. Oxenham*, 7 M. & W. 131 (1840); *Doe Johnston v. Liversedge*, 11 M. & W. 517 (1843).

(*y*) *Smyth v. Leavens*, 3 U. C. R. 411 (1847); *Doe Baddeley v. Massey*, 17 Q. B. 373 (1851); *Brueya v. Rose*, 19 O. R. 438 (1890), *MacMahon, J.*

*Case of lease void ab initio* :—Where a lease of charity lands not being in conformity with the statute 13 Eliz. c. 10, was adjudged absolutely void, the Court also held that the right to re-enter existed from the moment of the execution of the lease (z).

5. (6) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received (whichever last happened).

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.  
Imp. Act, 3-4 Wm. IV. c. 27, s. 8.

*"Tenant from year to year"* :—Woodfall gives the following definition, "A tenant from year to year is one who holds under a demise (express or implied) for a term which may be determined at the end of the first or any subsequent year of the tenancy, either by the landlord or the tenant, by a regular notice to quit" (a).

*"Without any lease in writing"* :—"A lease in writing: that is not merely an instrument which would be evidence of the conditions of holding, but one passing an interest" (b).

The interest of a tenant from year to year does not determine on his death, but is an interest transmissible to his representatives" (c).

(z) *Magdalen Hospital v. Knotts*, 4 App. Cas. 324 (1879). *Held, per* Lord Selborne, that if any rent, however small, had been reserved and received it would have created the legal relation of a tenancy from year to year and prevented the currency of the statute.

(a) *Landlord and Tenant*, 15th Ed. 230. Cf. *Doe v. Wood*, 14 M. & W. 682. See notes on page 32, *supra*. See also *Archbold v. Scully*, 9 H. L. C. 360 (1861); *Drummond v. Sant*, L. R. 6 Q. B. 763 (1871).

(b) *Coleridge, J.*, in *Doe d. Landsell v. Gower*, 17 Q. B. 599 (1851).

(c) *James v. Dean*, 15 Ves. 248 (1808), citing *Doe v. Porter*, 3 T. R. 13.

As to payment after statutory period by tenant from year to year, see *Bunting v. Sargent* (d), *Sanders v. Sanders* (e).

For further cases on tenancy from year to year, see *Doe v. Wood* (f), *Denn v. Cartwright* (g), *Doe v. Pullen* (h).

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year. Imp. Act, 3-4 Wm. IV. c. 27, s. 7.

5. (7) Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

*Change operated by present section*:—There is a long and instructive criticism of the present section in *Doe Perry v. Henderson* (i), in which Robinson, C.J., shews how the framers of the Act, i.e. the real property commissioners innovated to an extent greatly beyond their intentions as expressed in their report. He says: "They treat the subject thus: 'great practical difficulty (they say) has arisen in determining what is *adverse* possession, and where it shall be considered to have begun. *This must generally be left as a question of fact for a jury.* But there are some rules of law which absolutely prevent the possession from being considered adverse (when it is in fact so, the commissioners mean), and the expediency of

(d) 13 Chy. D. 330 (1879).

(e) 19 Chy. D. 373 (1881). Cf. *Stagg v. Wyatt*, 2 Jur. 892.

(f) 14 M. & W. 687, implication of tenancy from year to year from payments of rent. Cf. *Doe v. Dodd*, 5 B. & Ad. 689; *Braythwayte v. Hitchcock*, 10 M. & W. 497; *Bishop v. Howard*, 2 B. & C. 100. But see *Doe v. Crago*, 6 C. B. 90, as to evidence in rebuttal of implication.

(g) 4 East, 29 (1803), lease for at least two years. Cf. *Doe v. Green*, 9 Ad. & Ell. 658 (1839); *Thompson v. Maberly*, 2 Campb. 573 (1811); *Buckworth v. Simpson*, 1 C. M. & R. 834; *Birch v. Wright*, 1 T. R. 378 (1786); *Doe v. Geikie*, 5 Q. B. 841; *Doe v. Smaridge*, 7 Q. B. 957.

(h) 2 Bing. N. C. 749, 753 (1836), tenant holding after term becomes tenant from year to year. Cf. *Doe v. Watts*, 7 T. R. 83.

(i) 3 U. C. R. 486 (1847).

which is very questionable, as they do not seem necessary for preserving rightful claims, and they greatly impair the healing tendency of the Statute of Limitations. One of these rules is, that a possession which began rightfully, cannot be considered as having been wrongful; that is, *adverse* as against the rightful owner, by being merely continued after the right of the party in possession has determined. It appears to us that *it should be open to a jury to find that adverse possession began from the determination of the rightful estate of the party.*'

"After reading these explanations, given by the commissioners of their views, one can hardly imagine that they were conscious that they were proposing enactments which, if adopted, were to have the effect of doing away thenceforward with all distinctions between adverse and non-adverse possessions, and leaving nothing '*open to the jury*' upon the point. Yet in *Doe dem. Knight v. Nepean*, 2 M. & W. 894, and several other cases, that has been determined to be the effect of the new Act."

*Nature of a tenancy at will*:—"A tenant at will is, where lands and tenements are let by one man to another to have and to hold at the will of the lessor, and the tenant by force of this lease obtains the possession: 1 Litt. p. 41, s. 68.

"In all cases where a tenancy at will is created, whether by express agreement, or without express agreement, as where, pending a treaty of sale, the purchaser is let into possession (*j*), or where he takes possession under a void lease, he enters acknowledging the title of the vendor or lessor; and thus the relation of landlord and tenant is established" (*k*).

(*j*) Cf. *Hegan v. Johnson*, 2 Taunt. 147; *Dunk v. Hunter*, 5 B. & Ald. 322; *Doe v. Chamberlaine*, 5 M. & W. 14.

(*k*) *M'Nish v. Munro*, 25 U. C. C. P. 297 (1875), *per Patterson, J.* See also *Rommell v. Henderson*, 22 U. C. C. P. 180 (1872).

*Good nature or inattention may cause a man to lose his estate*:—"This is a stringent rule, which the statute prescribes, and one that may lead in some cases to great injustice and hardship, where there has been an occupation permitted as a matter of indulgence or through mere inattention, to a party who had never defied or questioned the title of the rightful owner, and who had never pretended to have a title himself. Still the answer is, that under the provisions of this positive law, good nature or inattention may occasion a man to lose his estate, however clear may be his right, for that the provisions of the statute are peremptory, and that it is necessary to enforce them, in order that all may see that there is an absolute and inflexible rule which will be adhered to, for the sake of quieting possessions" (l).

*Statute not to be liberally construed as against former owner*:—"It is no less true and just . . . that no man's legal title should be extinguished by the operation of this statute, unless the facts are such as do clearly, and without the aid of any liberal construction, bring his case within it; and that he should have the full benefit allowed him of every exception which fairly takes his case out of the statute. So much, at least, is due to the former owner of the estate" (m).

Sometimes it will favour the former owner to construe the occupant as having entered as tenant-at-will rather than as trespasser, thereby adding a year to the required period. In such cases the Courts shew an inclination to construe the possession as having commenced in a tenancy at will (n).

*Interruption of tenancy at will ; statute runs from the creation of a new tenancy*:—"We have thus a conjunction

(l) Robinson, C.J., in *Doe d. Shepherd v. Bayley*, 10 U. C. R. 318 (1853). Cf. *McLaren v. Morphy*, 19 U. C. R. 609 (1860).

(m) Robinson, C.J., in *Doe d. Shepherd v. Bayley*, 10 U. C. R. 318 (1853).

(n) See *Amey v. Card*, 25 U. C. R. 507 (1866).

of two facts; first, the determination of the first tenancy at will by the death of the owner: *James v. Dean*, 11 Ves. at p. 391 (o); and next, the creation by implication of a new tenancy at will as between the legal owners of the estate—the trustees—and the *cestui que trust* (p). The character of the two holdings is quite distinct, and the latter is exclusive of the former. Apart from fiduciary relationship, it is plain that here the running of the statute is interrupted, as laid down in *Hodgson v. Hooper*, 3 Ell. & Ell. at p. 171. If before the right of entry upon a tenant at will is gone, the tenancy is put an end to and a new tenancy at will created by fresh agreement express or implied, then a fresh right of entry accrues and an additional period of twenty [now ten] years must run before that entry would be barred" (q).

*Effect of consent to remain as tenant:—*An entry under assertion of right, and a submission by the occupant, and consent to remain as tenant to the owner create a new tenancy at will and give a fresh point of departure under the Statute of Limitations (r).

*Agreement for new tenancy created by implication:—*"Doubtless, an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a jury that the parties actually made such an agreement; and in that event it is proper to be found by a jury as a material fact in issue" (s).

*Interruption of tenancy at will by acquiescence in new arrangement:—*In *McDermid v. Hughes* (t) a deed

(o) Cf. *Doe d. Kingsbury v. Stewart*, 5 U. C. R. 108 (1848).

(p) The former tenant-at-will in this case became beneficiary (with others) under the will of the owner.

(q) *Boyd, C.*, in *Re Defoe*, 2 O. R. 625 (1882). But see *Locke v. Matthews*, 13 C. B. N. S. 753; *Turner v. Doe*, 9 M. & W. 643.

(r) *Smith v. Keown*, 46 U. C. R. 163 (1881); see also *Cooper v. Hamilton* cited *supra* as to effect of submission; *Pearson v. Mulholland*, 17 O. R. 514 (1889); *Workman v. Robb*, 7 A. R. 389 (1882).

(s) *Day v. Day*, L. R. 3 P. C. 762 (1871).

(t) 16 O. R. 570 (1888).



was made conveying the legal estate to D., one of the conditions being that D. should release the defendant from certain debts. "The defendant knew of the deed . . . and of the agreement it was intended to carry out and the benefit he was to receive upon its being given, and he allowed the deed to be given without any objection being made by him, and received the benefit it conferred upon him. Under these circumstances, I am of opinion that he is precluded from asserting that this deed did not convey the possession it purported to convey, and from setting up any possession in himself prior to such deed; *Re Shaver* 3 Chy. Ch. R. 379" (u).

*Requisites for agreement creating new tenancy* :—"As stated by Sir William Erle, C.J., in *Lock v. Matthews* (v), 'if the owner enters effectively, and creates a new tenancy at will, he has [twenty-one] years from that period before he can forfeit his estate.' The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will" (w).

*Mere determination of tenancy at will after one year will not stop currency of statute* :—"I have felt and still feel, very great difficulty in holding that a son holding for seven or eight years as tenant at will under his father, can procure the latter to borrow money on mortgage of the land for the use of his son, who receives the money and spends it, and yet is not to be held as bound by such an act to the admission that at that time the land was his

Armour, C.J., at p. 575, who also held that any possession that the tenant might claim at all, at the giving of the deed, was as tenant-at-will.

(u) 1 B. N. S. 761.

(v) *Day v. Day*, L. R. 3 P. C. 763 (1871). See *Williams v. McDonald*, 10 C. C. L. 23 (1873).

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father's, and so prevent the Statute of Limitations from continuing to run from an earlier period.

"But the authorities show that the Statute in the present case certainly began to run at the end of a year from the defendant's entry, and the bar under our late Act must prevail, unless there have been, not merely a determination of the original will, and a mere continuance in possession on sufferance, but some evidence from which it can fairly be held that a new tenancy at will was created between them" (x).

"The question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the Statute sufficient to set it running it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant for *all* purposes, when he was already, from the end of the first year, for the purposes of the bar of the Statute—a tenant at sufferance" (y).

(x) Hagarty, C.J., in *Keffer v. Keffer*, 27 U. C. C. P. 288 (1877). See also *ib.* for judgment of Gwynne, J., and cases cited therein. See *Doe v. Carter*, 9 Q. B. 863, *Doe v. Turner*, 7 M. & W. 226, determination after one year, starting point of statute; *Randall v. Stevens*, 2 E. & B. 641, resumption of possession after being turned out; *Allen v. England*, 3 F. & F. 49, new starting points.

(y) *Day v. Day*, L. R. 3 P. C. 761 (1871). For cases on determination of tenancy at will, see *Peacock v. Peacock*, 16 Ves. 57, *Lighton v. Theed*, 1 Ld. Raym. 707, determination by one party at time prejudicial to other; *Doe v. Turner*, 7 M. & W. 226, entry and acts of user by landlord; *Ball v. Cullemore*, 2 C. M. & R. 120, feoffment; *Daniels v. Davidson*, 16 Ves. 252, agreement for sale; *Doe v. Price*, 9 Bing. 356, letter from owner to tenant; *Pinhorn v. Sonster*, 8 Exch. 763, tenant can only determine by notice; *Doe v. Thomas*, 6 Exch. 854, insolvent debtor; *Hogan v. Hand*, 9 W. R. 673, effect of lease to third person.

*Tenancy at will or tenancy for life*:—In *Roan v. Kronsbein* (z), the application of the statute depended on the interpretation of an agreement between R. and Mrs. H. to this effect: "It is agreed . . . that the said Mrs. H. be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of the said R." Mrs. H. died within ten years of R.'s action. Upon which circumstances Cameron, C.J., observed: "Are the words 'permitted to occupy' equivalent to 'grant,' or 'demise,' or 'lease' ? If they are, then an estate for life was granted by R. to Mrs. H. If they are not, a mere tenancy at will or license of occupation was created. In the former case the plaintiff could not have brought ejectment before the death of Mrs. H. and is entitled to succeed to the extent prayed by his motion. In the latter the Statute of Limitations bars his claim" (a).

*Possession of brother as tenant at will*:—In *Grant v. O'Hara* (b), H. O'H. purchased from D. M. in 1870, and his brother J. O'H., having paid a small portion of the purchase money, entered into possession. H. O'H., who occasionally visited the place, mortgaged the same to the plaintiff, who issued his writ for ejectment in 1881. To the claim of J. O'H. for title by possession, the Court said;—"We think it clear that the very highest right or claim which could be recognized in defendant under the statute could not commence until the expiration of a year after his entry."

In *Cooper v. Hamilton* (c), John C., the owner, placed his brother Jas. C. in possession about the year 1854. The defendant and his wife (the daughter of Jas. C.) went, in 1867, at the instance of John C., to live with Jas. C. John

(z) 12 O. R. 203 (1886). Cameron, C.J.

(a) The decision was in favour of a life tenancy.

(b) 46 U. C. R. 279 (1881).

(c) 45 U. C. R. 502 (2681).

C. died in 1874, devising to plaintiff; Jas. C. died in 1874, and his wife a year later. The defendant and wife continued in possession, and claimed to resist ejectment brought by the plaintiff in 1879. Hagarty, C.J., held that the defendant was never tenant to John C. during the lifetime of Jas. C. and his widow, and that therefore the statute would not run in his favour until a year from the widow's death (*d*).

5. (8) No mortgagor or *cestui que trust* shall be deemed to be a tenant-at-will within the meaning of the next preceding subsection to his mortgagee or trustee.

Case of mortgagor or *cestui que trust*.

*Object of sub-section 8*:—A mortgagor, or *cestui que trust* in possession, was, for some purposes, treated in the courts of law as a tenant (*e*), and the object of the present sub-section was to prevent *ex majore cautela* such an interpretation of his possession from barring the title of his mortgagee or trustee under sub-section 7.

*Occupation of cestui que trust*:—The doctrine that a *cestui que trust*, who is in possession with the consent or even the mere acquiescence of the trustee, must be regarded as his tenant at will, applies only to the case where the *cestui que trust* is the actual occupant (*f*).

*Effect of sub-section 8 as to trusts*:—The present sub-section "is equivalent to saying that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have accrued at the expiration of one year next after the commencement of the tenancy" (*g*).

(*d*) See also judgment of Armour in same case for effect of submission by defendant to plaintiff's claim.

(*e*) See *Patridge v. Bere*, 3 B. & Ald. 604 (1822); *Doe Roby v. Maisiey*, 8 B. & C. 767 (1828); *Melling v. Leak*, 16 C. B. 667 (1855), mortgagor tenant by sufferance, not by will; *Bird v. Wright*, 1 T. R. 378. See further, p. 131, *supra*.

(*f*) *Melling v. Leak*, 16 C. B. 669 (1855).

(*g*) *Garrard v. Tuck*, 8 C. B. 253 (1849).

*Express trusts are meant :—See Doe v. Rock (h).*

*But position of cestui que trust may be presumed :—In Re Defoe (i), the tenant at will, being one of the beneficiaries under the will of the owner (his father), who devised the property in question to trustees, it was presumed that he had accepted the interest under the will, and the present section was brought to bear.*

In case of forfeiture or breach of condition. Imp. Act, 3-4 Wm. IV. c. 27, s. 3.

5. (9) Where the person claiming such land or rent, or the person through whom he claims, has become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession. Imp. Act, 3-4 Wm. IV. c. 27, s. 4.

5. (10) Where any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition has first accrued in respect of any estate or interest in reversion or remainder, and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same became an estate or interest in possession as if no such forfeiture or breach of condition had happened.

*Sub-section 10 re-enacts the old law :—See Kemp v. Westbrook (j).*

*“Forfeiture or breach of condition” :—“I think that the true way of reading the statute is to give the words ‘forfeiture’ and ‘breach of condition’ their largest sense, and to make them apply whether the forfeiture gives a right to an estate under a conditional limitation or whether it is a true forfeiture at law, which can only be taken advantage of by the heir” (k).*

(h) 4 M. & G. 32 (1842), case of agreement to purchase; cf. Sands to Thompson, 22 Ch. D. 614 (1883), case of satisfied mortgage. But see Drummond v. Sant, L. R. 6 Q. B. 763, agreement for lease.

(i) 2 O. R. 623 (1882).

(j) 1 Ves. Sen. 278 (1749); cf. Doe v. Blakeway, 5 C. & P. 563; Doe v. Danvers, 7 East, 299.

(k) Jessel, M.R., in Astley v. Earl of Essex, L. R. 18 Eq. 290 (1874.)

*Forfeiture under a lease* :—"It is to be observed, also, that the statute speaks not only of the right of action, but of the right of entry, and in truth where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce the right of entry. . . . The real right being the right of entry, when did that right accrue? Not on demand or notice, for no demand or notice is necessary; and not on the entry itself, for the entry is in assertion of the pre-existing right" (l).

5. (11) Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

In case of future estates.  
Imp. Act.  
3-4 Wm. IV.  
c. 27, s. 3.

5. (12) A right to make an entry or a distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession, by the determination of any estate or estates in respect of which such land has been held, or the profits thereof or such rent have been received notwithstanding that the person claiming such land or rent, or some person through whom he claims, has, at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent. R. S. O. 1877, c. 103, s. 5.

Provisions for case of future estates.  
Imp. Act, 3-4 Wm. IV. c. 27, s. 5; 37-38 V. c. 57, s. 2.

*Remainderman; tenant for life* :—The Statute of Limitations will not begin to run against a remainderman until the death of the tenant for life (m). "The proposition that time can never be said to run against a

(l) *Governors of Magdalen Hospital v. Knotts*, 8 Ch. D. 727 (1878), case of voidable lease. See further *Doe v. Bliss*, 4 Taunt. 725, *Macher v. Foundling Hospital*, 1 Ves. & B., as to fresh rights of re-entry on fresh defaults; *Cosbie v. Sugrue*, 9 Ir. L. R. 17, as to law in Ireland.

(m) *Adamson v. Adamson*, 12 S. C. R. 563 (1886). See also *Young v. Midland R. W. Co.* 16 O. R. 740 (1889), case of reversion in the compensation for land taken by railway; *Shaw v. Shaw* 8 U. C. C. P. 273 (1859).

remainderman, so long as a tenant for life under the same will or settlement is in possession, which is, in effect, the present case, seems so plain that scarcely any authority is called for . . . In short, the statute has no application except so long as the title and possession are separate, when the possession is in the rightful owner Statutes of Limitation are not required" (n).

*Remainderman; tenant in tail*;—The cases in 12 C. B. (o) shew that the statute did not begin to run against the contestant until his father died, which is said to have been about the year 1862; that 'though there is a difficulty in understanding why in principle such a distinction should exist,' still the statute did make a distinction between a case where a tenant in tail should voluntarily abandon his interest during his life and remain out of possession for [twenty] years, and a case where he should convey his interest and thereby put it out of his power to make an entry or bring an action; that in the former case the issue was barred; and that in the latter (which is the present) case, time was not to run against the issue until the death of the tenant in tail" (p).

*Equitable remainderman*;—The same rules apply to an equitable owner in remainder as to a legal, under the statute. The equitable owner is, notwithstanding the Judicature Act, compelled to proceed against a trespasser in the name of the trustee of the legal estate but the Court would restrain the party in possession from setting up the statutory bar against the trustee except so far as it applied to the equitable title (q).

(n) *Gray v. Richford*, 2 S. C. R. 455 (1878), *per* Strong, J. See *Paine v. Jones*, L. R. 18 Eq. 320 (1874), case of possession by tenant for life against remainderman.

(o) *Cannon v. Rimington*, pp. 1 & 14; *Rimington v. Cannon*, pp. 18 & 33 (1853).

(p) *Mowat, V.C.*, in *Re Shaver*, 3 Chy. Ch. 381 (1871).

(q) *Adamson v. Adamson*, at 7 A. R. 612, *per* Burton, J. A.



*Remaindermen; where statute running in testator's lifetime*:—"The statute having begun to run in the lifetime of the testator, it is well settled, and beyond the reach of controversy, that the plaintiff is not entitled to the protection accorded by the statute to remaindermen, reversioners and other owners of future estates, as he would have been if the statute had only commenced to run after the testator's death" (r).

6. (1) If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action shall be brought, by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession whichever of those two periods is the longer.

(2) If the right of any such person to make such entry or distress, or to bring any such action, has been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined as aforesaid, shall make any such entry or distress, or bring any such action, to recover such land or rent.

(3) Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period hereinbefore limited, which is applicable in such case, and such person has, at any time during the said period, been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility,

Time limited as to future estates when person entitled to the particular estate out of possession, etc. Imp. Act 37-38 V. c. 57, s. 2.

The case of bar of future estate and of a subsequent interest created after right of entry, etc., accrued to owner of particular estate. Imp. Act, 37-38 V. c. 57, s. 2.

When the right to an estate in possession is barred, the right of the same persons to future estates shall also be barred. Imp. Act, 3-4 Wm. IV. c. 27, s. 20.

(r) *Gray v. Richford*, 2 S. C. R. 453 (1878), *per Strong, J.*

unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession. R. S. O. 1877, c. 108, s. 6.

*"Out of possession"* :—"The clause in question plainly applies to a case in which the person entitled is out of possession, *i.e.* where the right to possession and the actual possession are separated; in such cases a cause of action accrues to the owner of the particular estate and on its cesser another cause of action accrues to the owner of the remainder, and the two periods mentioned in the enactment run respectively from the accruing of these rights of action" (s).

An administrator to claim as if he obtained the estate without interval after death of deceased.  
Imp. Act 3-4 Wm. IV. c. 27, s. 6.

7. For the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. R. S. O. 1877, c. 108, s. 7.

*Old rule that time run from grant of administration* :—See *Cary v. Stephenson* (t).

*Application of this section* :—It has been held that this section applies for all purposes of the Act; as well to cases arising under section 23 *infra* as under the earlier portions of the Act, and that when administration is taken out the rights of parties are the same as if the letters of administration had been granted immediately after the death of the intestate, and accordingly that time under the statute begins to run as from the date of the death, and not from that of the grant (u).

See further the notes under cap. 108 *supra*.

(s) *Pedder v. Hunt*, 18 Q. B. D. 570 (1887).

(t) 2 Salk. 421. Citing *Stanford's case*, Cro. Jac. 61.

(u) *Re Bonsor and Smith's contract*, cited in *Re Williams, Davies v. Williams*, 34 Ch. D. 560 (1886).

8. No person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon. R. S. O. 1877, c. 108, s. 8.

A mere entry not to be deemed possession.  
*Idem.* s. 10.

*Elements of a proper entry*:—"J., as devisee of R., and in assertion of his title in fee, resumed possession of the premises in question, and re-annexed them to the residue of the land, and continued in such possession until W., some time afterwards, re-entered upon him. Possession was taken by J., *animo possidendi*, and, as is said by Lord Campbell, in *Randall v. Stevens* (v): 'Whether possession was retained by him an hour or a week must be immaterial.' . . . I cannot well conceive what plainer exercise of his fee simple rights J. could have shewn than by entering, and not *merely* entering but fencing except on the side adjoining his own orchard and in sowing the premises in grass to correspond with his orchard, and throwing the premises in question with an adjoining field into one, and so occupying for, it would seem, a period of some months" (w).

*Entry by owner upon a portion of his land*:—"It appears to me that when the true owner in exercise of his rights enters upon any portion of his own land which is not in actual possession by another person, he must necessarily be considered as being in possession of the whole" (x).

9. No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. R. S. O. 1877, c. 108, s. 9.

No right to be preserved by continual claim.  
*Idem.* s. 11.

(v) 2 El. & Bl. 641.

(w) *Clements v. Martin*, 21 U. C. C. P. 512 (1871). Cf. *Henderson v. Harris*, 30 U. C. R. 360 (1870); *Williams v. McDonald*, 33 U. C. R. 423 (1873); *Palmer v. Thornbeck*, 27 U. C. C. P. 304, (1877); *Canada Company v. Douglas*, 27 U. C. C. P. 329 (1877). *Young v. Hobson*, 30 U. C. C. P. 431 (1879). Cf. also, *Worssam v. Vandenbrande*, 16 W. R. 53, erection of fence, *Doe v. Combes*, 9 C. B. 714, where removal of portion of fence, etc., held not sufficient disturbance of defendant's possession.

(x) *Galt, J.*, in *Great Western Ry. Co. v. Lutz*, 32 U. C. C. P. 169 (1881).

*Continual claim*:—So called because at the common law it must have been made within every year and a day (*y*). It consisted of an actual entry; a mere demand, without process or acknowledgment, having no force against the Statute of Limitations (*z*).

No descent, warranty, etc., to bar a right of entry or action.  
*Idem*, s. 39.

10. No descent cast, discontinuance or warranty, which has happened or been made since the first day of July, 1834, or which may hereafter happen or be made, shall toll or defeat any right of entry or action for the recovery of land. R. S. O. 1877, c. 108, s. 10.

*Right of entry tolled by descent cast*:—"In cases of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be *tolled*, that is taken away by descent. Descents, which take away entries, are when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir; in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate" (*a*).

*"Discontinuance"*:—"A discontinuance of estates in lands or tenements is properly (in legal understanding) an alienation made or suffered by tenant in tail or by any that is seised in *autre droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and can not enter" (*b*).

*Warranty*:—By warranty is meant a "covenant real" (*c*). "In many cases a warranty added to a convey-

(*r*) Coke, Litt. 250*b*.

(*z*) See *Ford v. Grey*, 1 Salk. 285; *Hodley v. Healey*, 1 Ves. & B. 540 (1813); *Hewitt on Limitations*, 167.

(*a*) Bl. Comm. Vol. III. 176.

(*b*) Co. Litt. 325*a*.

(*c*) See p. 41, *supra*.

ance is said to make a discontinuance *ab effectu*, although he that made the conveyance was never seised by force of the estate tail, because it taketh away the entry of him that right hath, as a discontinuance doth" (*d*).

The learning contained in the above three notes was archaic, and by the above section 10, is now obsolete.

11. Where any one or more of several persons entitled to any land or rent as co-parceners, joint tenants or tenants in common have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them. R. S. O. 1877, c. 198, s. 11.

Possession of one co-parcener, etc., not to be the possession of the others. Imp. Act, 3-4 Wm. IV. c. 27, s. 12.

*Old law as to co-owners*:—"It has been mentioned that the fine of a joint tenant, or tenant in common (and consequently that of a co-parcener) though purporting to comprise the whole land, will not of itself affect the estate of the co-usor's companion; nor will his simply taking all the profits of the land without accounting to his companion, constitute such an *adverse possession* as by lapse of time will make the claim of the latter unavailable (*e*).

*Effect of this sub-section on rights of tenants in common, etc.*:—"The effect of this section, so far as relates to the objects of the Act, is to make the possessions of the tenants in common separate and distinct. The actual possession, therefore, of one tenant in common is, in point of law, separate from that of his co-tenants not in possession, and the right of the tenant out of possession is for the purposes of the Act deemed to have first accrued from the time of the entry of the co-tenant" (*f*). To the co-tenants

(*d*) Co. Litt. 339a.

(*e*) Burton's Compendium, 398.

(*f*) Harris v. Mudie, 7 A. R. 418 (1882) per Burton, J.A. Cf. Culley v. Doe, 11 Ad. & Ell. 1008; Doe v. Horrocks, 1 Car. & K. 136; O'Sullivan v. McSwiney, 1 Long. & T. 119.

not in possession, the tenants entering are in the position of mere strangers, nor could the tenants out of possession be affected by notice to those in possession (g).

The result of the statute is that one of several tenants in common one day before the expiration of the statutory period, might make an entry or bring an action which would preserve his right. But on the following day the title of all the other co-tenants would be extinguished (h).

*Point of time from which this sub-section operates :—* Where a testator devised to three sons as tenants in common of land as to one-third of which there was a preceding life estate, and two of the sons exclusively occupied each one of the other thirds. U., the third son found himself entitled only to one-third of the third which had been subject to the life estate. As expressed by Draper, C.J.—“This enactment operates back by relation, from the first commencement of the separate possession; consequently U. was put to his right of entry by A.'s taking the entirety of one part, and J. the entirety of another part . . . as to to which parts there was no intermediate estate for life created. The statute began to run against him as soon as the disability of nonage was removed” (i).

*Distinction between occupation of trespasser and separate occupation of tenant in common :—*“As to the defendant being only in possession of the land he actually occupied, so as to bring the case within the decision of *Doe Hill v. Gander* (j) there is an obvious distinction. In that case the defendant had got part of the plaintiff's land as a trespasser without title. His title by [twenty] years'

(g) *Ib.* 418, 419.

(h) *Ib.* 419. See *Kennedy v. Bateman*, 27 Gr. 380 (1880). Cf. *Woodroffe v. Doe*, 15 M. & W. 792 (1846).

(i) *Shaw v. Shaw*, 8 U. C. C. P. 273 (1859). Cf. *Re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553 (1887), possession of father.

(j) 1 U. C. R. 3 (1844).

possession was, therefore, limited to the land he actually occupied. But here the defendant was a tenant in common of the whole lot. . . . He had title to an undivided part of every part of it, and when he entered into possession, he must be taken to be in possession of all to which his right of possession would extend" (k).

*Adult and infant co-owners*:—In *Hobbs v. Wade* (l) a father was, during the statutory period, in receipt of the rents of a property of which one undivided share belonged to an infant child and the other to an adult child; the adult was held barred, while the father was treated as bailiff for the infant.

*Tenant in common out of possession acquiring interest of one in possession*:—Where there are several tenants in common of land, of whom all but one are in possession, and before the ten years have run the latter acquires another undivided share from under one of those in possession, the statute runs as to both shares from the time the last one was acquired (ll).

*A wrongful possession by two persons makes them joint tenants*:—"Here two persons are in lawful possession; . . . the title under which they hold it comes to an end, but they continue in possession, and thus go on holding a certain share of the property without any title whatever. In what capacity do they so hold on? It appears to me as joint tenants. The possession of each became wrongful as to his share at the same moment of time, so that they acquired their title at the same moment of time, they held

(k) *Meyers v. Doyle*, 9 U. C. C. P. 376 (1860). Cf. *Murphy v. Murphy*, 11 Ir. C. L. R. 205.

(l) 36 Ch. D. 553 (1887). See *Burroughs v. McCreight*, 1 J. & Lat. 290, as to trustees.

(ll) *Hill v. Ashbridge*, 20 A. R. 44 (1892).



by one common right, or by one common wrongful title, whichever you please to call it" (m).

*Payments by one to another tenant in common or his assigns, presumption arising from:—*In *Sanders v. Sanders* (n), it was held that the payment by one tenant in common of a moiety of the rents to persons claiming under the other tenant in common, from 1864 to 1877 raised a presumption that a similar payment was made previously.

*Liability of one co-owner to another:—*See *McMahon v. Burchell* (o); *Teasdale v. Sanderson* (p); *Leigh v. Dickson* (q); *Watson v. Gray* (r); *Henderson v. Esson* (s); *Johnson v. Wild* (t).

Possession of relations not to be the possession of the heirs.  
*Idem*, s. 13.

12. Where a relation of the persons entitled, as heirs, to the possession, or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs. R. S. O. 1877, c. 108, s. 12.

*Occupation by widow of owner:—*In *Johnson v. Oliver* (u), the widow was in occupation to the exclusion of the heirs-at-law, and there being no evidence of any agreement by which she held *qua doweress*, the title of the heirs-at-law was barred. "It seems anomalous that if the

(m) *Ward v. Ward*, L. R. 6 Ch. 789 (1871). Cf. *Bolling v. Hobday*, 31 W. R. 9, *Williams v. Williams*, L. R. 2 Ch. 294. As a wrongful possession is not an assurance of any sort, section 20 of chapter 108 will not affect this creation of joint tenancies.

(n) *Sanders v. Sanders*, 19 Ch. D. 373 (1881).

(o) 2 Phil. 127 (1846), mere occupation without exclusion makes no liability.

(p) 33 Beav. 534 (1864), occupation rent, in partition action. See also *Pascoe v. Swan*, 27 Beav. 508 (1859).

(q) 15 Q. B. D. 60 (1884), co-tenant over-holding after expired lease by other co-tenant.

(r) 14 Ch. D. 192 (1880), removal of obstruction erected by one co-tenant.

(s) 2 Phil. 308 (1847), one co-tenant acting as executor of other.

(t) 44 Ch. D. 146 (1890), right of contribution.

(u) 3 O. R. 26 (1883).

widow had been proceeded against by the heirs-at-law before their title was extinguished for an account of the rents and profits of the land received by her, she would have been entitled to retain one third of the rents and profits as having been received by her *qua* dowress, and yet during all the time during which these rents and profits were accruing her possession of the land was ripening into a title under the Real Property Limitation Act on the ground that she was in possession not as dowress but as a wrong-doer. But the Real Property Limitation Act cannot be thus evaded, for the right of the heirs-at-law to bring an action against the widow to recover the said land accrued to them upon the death of Charles Ross and it would have been no answer by her to such action that she was entitled to dower in the said land" (*v*).

*Occupation by father*:— See *Re Hobbs*, *Hobbs v. Wade* (*w*).

*Corresponding section in the Imperial Act*:— Our section is adopted from the Imperial Act, which particularly specifies the possession of a "younger brother," a term which in Ontario, since the abolition of primogeniture, has lost much of its meaning. An explanation of the Imperial section will be found in *Jones v. Jones* (*x*).

13. Where any acknowledgement of the title of the person entitled to any land or rent has been given to him or to his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed according to the meaning of this Act to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress

Acknowledgment in writing given to the person entitled or his agent, to be equivalent to possession or receipt of rent.

(*v*) *Id.* per Armour, J., citing *McDonald v. McIntosh*, 8 U. C. R. 388; *Leach v. Shaw*, 8 Gr. 494; *Laidlaw v. Jackes*, 27 Gr. 101; *Fraser v. Gunn*, 27 Gr. 63. Cf. *Doe v. Long*, 9 C. & P. 773; *Doe v. Lawley*, 13 Q. B. 954.

(*w*) 36 Ch. D. 553 (1887).

(*x*) 16 M. & W. 712 (1847).

Imp. Act,  
3-4 Wm. IV.  
c. 27, s. 14.

or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. R. S. O. 1877, c. 108, s. 13.

*General effect of written acknowledgment:*—“An acknowledgment of title in writing makes the possession of the person making the acknowledgment the possession of the person to whom it is made” (*y*).

*Offer by party in possession to purchase from owner:*—An agreement by the person in possession to purchase the land from the rightful owner is a sufficient acknowledgment (*z*). So too an unqualified offer to purchase: thus, where the defendant requested a person to write to the plaintiff's agent, offering to purchase the land (which offer fell through); and after the action was commenced made another offer, the Court considered that these offers, unaccompanied as they were by any denial of the plaintiff's title, were sufficient to warrant a jury in finding for the plaintiff (*a*). Again, it was held a clear recognition of the plaintiff's title where the occupant made an offer to purchase and a payment on account (*b*).

*Offer after statutory period not equivalent to acknowledgment:*—“It was urged that the defendant's offer to the plaintiff of \$100, if he would give him a warranty deed, was such an admission of title that it removed the statutory bar of prescription. It is manifest the offer can have no such effect. The *paper title* which the defendant wanted may be worth to him \$100, although he has a perfect title by the statute. The title would be more marketable if a paper title could be shown. The defendant did not by his

(*y*) *Cahuac v. Cochrane*, 41 U. C. R. 439, (1877).

(*z*) *Cahuac v. Cochrane*, 41 U. C. R. 439 (1877).

(*a*) *Penlington v. Brownlee*, 28 U. C. R. 189 (1868). Cf. *Dublin v. Judge*, 11 Ir. L. R. 9, proposal for lease; also, *Doe v. Emonds*, 6 M. & W. 295 (1840), as to qualified acceptance of proposal for lease.

(*b*) *Doe Boulton v. Walker*, 8 U. C. R. 572 (1852).

offer give up or abandon any right he had, nor did he declare he had no right; he was proposing to acquire a further right, and for that he was willing to give the sum he offered "(c).

*Nor offer by occupant under imperfect paper title :—*

An offer by the occupant, who has no claim to a paper title, to buy the land from the owner, is to be distinguished from "the case of a party who, being in possession under an imperfect title, or at least under some claim of right has endeavoured to strengthen his title by getting in some outstanding claim. In such cases it would not be fair to infer that he intended to acknowledge the right of the party to dispossess him if he pleased, if he declined to confirm his title "(d).

*Written acknowledgment, however obtained, is binding if true :—*"As to the suggestion that the written acknowledgment by the defendant was obtained by fraud, there is no foundation whatever for it. According to the defendant's own evidence, the agent of the Canada Company stated nothing to her upon the occasion of her signing the acknowledgment but what was the simple truth; and even if he had stated something not true, she has set her hand to nothing which does not appear to be strictly true. We cannot see upon what principle a document, signed by a party, containing nothing but the simple truth, and the signing which did not and could not do any prejudice to the party signing, but contrariwise, benefit, by procuring her permission to remain in possession, could be set aside upon the pretence of being obtained by fraud. Such a ruling would, on the contrary, enable the defendant to commit a fraud, by enabling her to set up a title now to land to which she had no title when she gave the

(c) *Beigle v. Dake*, 42 U. C. R. 261 (1877). Cf. *Sanders v. Sanders*, 19 Ch. D. 373.

(d) *Drake v. North*, 14 U. C. R. 476 (1857).

acknowledgment, and from which, but for her signing the acknowledgment, she would have been evicted" (e).

*Verbal acknowledgment of no value as an acknowledgment*: — "R. has unequivocally acknowledged to several persons . . . that the land was his father's and not his. The answer to this is, that all such verbal acknowledgments are made by the statute unavailing. If they were proved to have been made while the [twenty] years were running, they would not signify, because the statute expressly makes a written acknowledgment of title necessary. If made after the twenty years had run out, they could not overturn the title in his son, which the lapse of [twenty] years had the effect of creating, and could not revive the title of the father which had been extinguished (f).

"*Or to his agent*:—An acknowledgment to a party's trustee is sufficient to take a case out of the statute (g).

*Acknowledgment by agent insufficient*:—See *Ley v. Peter* (h).

*Notice to quit by landlord*:—A mere notice to quit given from time to time by a landlord, and followed by no effectual proceedings, will be of no avail to prevent the currency of the statute, even in cases in which a previous tenancy has been clearly shown (i).

*Can an acknowledgment be made so as to start statute running at future date?*—In *Jones v. Cleveland* (j), a

(e) *Ferguson v. Whelan*, 28 U. C. C. P. 116 (1877).

(f) *Robinson, C.J.*, in *Doe Perry v. Henderson*, 3 U. C. R. 499 (1847); see *Hayden v. Williams*, 7 Bing. 168.

(g) *McIntyre v. The Canada Company*, 18 Gr. 367 (1871). Cf. *Goode v. Job*, 28 L. J. Q. B. 1; *Fursden v. Clegg*, 10 M. & W. 572 (1842).

(h) 3 H. & N. 101 (1858). But see *Dublin v. Judge*, 11 Ir. L. R. 9, inability through sickness to write.

(i) *Doe Ausman v. Minthorne*, 3 U. C. R. 427 (1847).

(j) 16 U. C. R. 9 (1858). Time begins to run the moment after the acknowledgment is given: *Burroughs v. McCreight*, 1 J. & Lat. 304 (1844); *Scott v. Nixon*, 3 Dr. & War. 388, 404 (1843).

vendee had gone into possession as an intending purchaser before the written contract was executed, such possession continuing for more than the statutory period. The written contract, however, contained a stipulation that the vendor would convey to the vendee at a certain future date if the vendee had then made all his payments, and it was contended that this was an acknowledgment of title in the vendor up to that date. The court, however, decided against this contention and decided also that the vendee was a tenant-at-will, and that the statute began to run at the end of one year from the execution of the contract.

*Estoppel by consent to a conveyance*:—The acknowledgment under this section must be carefully distinguished from an estoppel which may be by conduct and not evidenced by writing. Thus the occupant of land assenting to a conveyance of the same even though he does not execute the deed of conveyance is precluded from asserting that the deed did not convey the possession it purported to convey and from setting up any possession in himself prior to such deed (k).

*Estoppel by consent to a mortgage*:—The conveyance to which the occupant assents may be a mortgage, in which case the right of the mortgagee does not accrue, or the statute run, until after the making of the mortgage (l).

*Draft deed as evidence*:—Another instance of a writing that need not be signed by the party in possession to be admissible as evidence, occurs in *McQueen v. McQueen* (m), where a copy or draft of a lease was produced in the occupant's own handwriting though not signed by him and was held to be properly admissible evidence.

(k) *McDiermid v. Hughes*, 16 O. R. 575, 582 (1888); *Re Shaver*, 3 Chy. Ch. R. 379, cited. For effect of recital in deed see *Jayne v. Hughes*, 10 Exch. 439 (1854), where deed dated more than 20 years back, but executed since.

(l) *Boys v. Wood*, 39 U. C. R. 495 (1876).

(m) 10 U. C. R. 193 (1853).

*Is sufficiency of acknowledgment matter of law or fact?*  
—See *Doe v. Edmonds* (n).

Receipt of rent  
to be deemed  
receipt of  
profits.  
Imp. Act,  
3-4 W. IV.,  
c. 27, s. 35.

14. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act. R. S. O. 1877, c. 108, s. 14.

At the end  
of the period  
of limitation  
the right of  
the party  
out of pos-  
session to be  
extinguished.  
Imp. Act,  
3-4 W. IV.,  
c. 27, s. 34.

15. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period shall be extinguished. R. S. O. 1877, c. 108, s. 15.

*Not merely is claim barred, but title is extinguished:—*  
“Under the Statute of Limitations (3 & 4 Will. IV., c. 27), as regards real property, the case is quite different, the title itself is extinguished, and the right of action wholly disappears. That is not a bar of the claim, it is a divesting of title or a transfer of title to somebody else” (o).

*Effect of subsequent entry by the person barred:—*“The very point came before Lord Selborne, sitting for the Master of the Rolls, in *Bryan v. Cowdal*, 21 W. R. 693. He there held that a person who suffered the statute to run before he asserted his right of entry, could not, by getting possession of the property, revive his title to it; for the Act had barred his estate and he was in as a mere trespasser. To the same effect is *Sanders v. Sanders*, L. R. 19 Ch. D. 373” (p).

(n) 6 M. & W. 295 (1840), a question for court. But see also *Morrell v. Frith*, 3 M. & W. 402 (1838), if doubtful document explained by extrinsic facts these are for jury; also *Incorporated Society v. Richards*, 1 Dr. & War. 258, 290 (1841) where Sugden, L.C., says: “The question is one for a jury, and would be thus put to a jury,—do the letters amount to an acknowledgment of title within the statute?”

(o) *Jessel, M.R.*, in *Dawkins v. Penrhyn*, 6 Chy. D. 322 (1877), holding that such transfer of title by statute is a good ground of demurrer. See L. R. 4 App. 51. See *Incorporated Society v. Richards*, 1 Dr. & War. 289; *Re Alison*, 11 Chy. D. 296.

(p) *Boyd, C.*, in *Court v. Walsh*, 1 O. R. 170 (1882); Cf. *Brassington v. Llewellyn*, 27 L. J. Ex. 297.



*Payment or acknowledgment after period* :—Not even a subsequent payment of rent or acknowledgment will restore the title which has been extinguished by the statute (q).

*Nature of interests barred* :—See *Sands to Thompson* (r), *Boll* . *Hobday* (s).

*Nature of interest acquired* :—"The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not one of acquisitive prescription—in other words, the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 Wm. IV. says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession should be extinguished, in which it differs from the Statute of James, which only barred the remedy by action; but its operation is by way of extinguishment of title only" (t).

The nature of the interest acquired by possession has lately come under discussion in *Tichborne v. Wier* (u), in which a lessee having been out of possession during the statutory period, it was sought to render the stranger in possession liable to the lessor on the ground that the statute transferred the lessee's rights and liabilities as against the landlord to the stranger in possession. Lord Justice Bowen says :—"It seems to me that the statute did not transfer anything. Section 34 of 3 & 4 Will. IV. c. 27,

(q) Jessel, M.R., in *Sanders v. Sanders*, 19 Chy. D. 373 (1881), case of tenant in common. As to acknowledgment, see *Markwick v. Hardingham*, 15 Ch. D. 339 (1880); *Lyell v. Kennedy*, 18 Q. B. D. 796.

(r) 22 Chy. D. 614 (1883), outstanding legal estate in mortgagee.

(s) 31 W. R. 9 (1882), trusts extinguished along with legal estate of trustees.

(t) *Gray v. Richford*, 2 S. C. R. 454 (1878), per Strong, J.

(u) 1893, 4 R. 29.

merely states that the right and title shall be extinguished. It was argued that the effect of extinguishing the title of the termor was to transfer the term with all rights and liabilities to the person in possession. The whole argument is based upon an overstraining of certain expressions used by Lord St. Leonards in *Incorporated Society v. Richards* (v), and of Baron Parke in *Doe d. Jukes v. Sumner* (w). But those passages were never intended to apply to the case of a lease. The effect of extinguishing the title of the one person, is to place in the hands of the person in possession the power of resistance, and in that sense he holds by a title under the statute, but not by a parliamentary conveyance. It seems to me that the operation of the section is accurately and guardedly expressed in 1 Dart's *Vendors' and Purchasers* 6th Ed. 463: 'Possession for a time exceeding the statutory limit not only bars the remedy but also extinguishes the right of the original owner. It has been said that the effect of the Act is to make a parliamentary conveyance of the land to the person in possession, after the statutory period has elapsed; but though it is true that the possessory owner after the statutory period has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner, not by any statutory transfer of the estate. If the statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges; and wherever it was in settlement his interest therein would constantly be varying according to the successive limitations of the settlement; but this is clearly not the operation of the statute.'"

(v) 1 Dr. & War. 258, 289.

(w) 14 M. & W. 39, 42, where Parke, B., speaks of the effect of the Act as "a parliamentary conveyance."

*Successive trespassers; in privity*:—"I take it as clearly established that possession is good against all the world except the person who can shew a good title. . . . There can be no doubt that a man has a right to devise that estate which the law gives him against all the world but the true owner" (x).

The rule as to trespassers in privity is thus stated by Mr. Hewitt, in his recent work on Limitations: "Where a person has been in possession without title, and such possession is continued by parties *claiming under him*, such parties respectively are entitled to add to the period of their possession, the time during which possession was held by any person through whom they claim. But a person can only claim *under* another in one of the regular modes known to the law, *e.g.* by devise, descent or conveyance. If therefore, a trespasser who has been in possession for less than [twelve] years dies intestate, and his widow holds for the remainder of the [twelve] years, she cannot claim the benefit of the time during which her husband was in possession (y).

*Successive independent trespassers as against original owner*:—Their Lordships of the Privy Council "are of opinion that if a person enters upon the land of another, and holds possession for a time, and then without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself.

(x) *Asher v. Whitlock*, L. R. 1 Q. B. 1, 6 (1865). Cf. *Clarke v. Clarke*, L. R. 2 C. L. 393; *Keefe v. Kirby*, 6 Ir. C. L. R. 591; *Doe Carter v. Barnard*, 13 Q. B. 952.

(y) Hewitt on Limitations, at p. 161, citing *Doe Carter v. Barnard*, *supra*.

No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant" (z).

*Successive independent trespassers inter se*:—"I take it as clearly established that possession is good as against all the world except the person who can shew a good title; and it would be mischievous to change this established doctrine. In *Doe v. Dyeball* (a) one year's possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him: 'You have no more title than I have; my possession is as good as yours'; surely ejectment could have been maintained by the original possessor against the defendant" (b).

*Is title under this statute marketable?*—"My impression is, that whenever the right is barred by time, a good title can be made; that the party in possession has the legal fee simple, and the purchaser will be bound to take such title" (c).

"But I do not think that the new Statute of Limitation in any respect abridges the period of sixty years, for which

(z) *Agency Company v. Short*, 13 App. Cas. 799 (1888). See *Ex p. Winder*, 6 Ch. D. 696, rights of parties where land turned into money.

(a) *Mood. & M.* 346.

(b) *Cockburn, C.J.*, in *Asher v. Whitlock*, L. R. 1 Q. B. 5 (1865). But see *Dixon v. Gayfere*, 17 Beav. 421. Cf. *Doe v. Cook*, 7 Bing. 346; *Doe v. Martin*, 1 Car. & M. 32.

(c) *Scott v. Nixon*, 3 Dru & War. 388, 405 (1843). Cf. *Tuthill v. Rogers*, 6 Ir. Eq. R. 441; *Lethbridge v. Kirkman*, 25 L. J. Q. B. 84.

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previously a good title must have been proved by the vendor. There are exceptions to the bar by lapse of time, by reason of infancy, and other disabilities” (*d*).

*Pleading the statute*:—The rule that the Statute of Frauds must be pleaded has no analogy to the case of the Statute of Limitation: “With regard to real property it is a question of title. . . : If upon the face of the bill the plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the statute allows his title to continue” (*e*).

For effect of possession under Land Titles Act, see R. S. O. 1887, c. 116, s. 27.

#### ARREARS OF DOWER, RENT AND INTEREST.

16. No arrears of dower nor any damages on account of such arrears, shall be recovered or obtained by any action for a longer period than six years next before the commencement of such action. R. S. O. 1877, c. 108, s. 16.

No arrears of dower to be recovered for more than six years. *Idem*. s. 41.

There was no limitation in equity to arrears of dower any more than at law without a special ground (*f*).

17. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent. R. S. O. 1877, c. 108, s. 17.

No arrears of rent or interest to be recovered for more than six years. *Imp. Act 3-4 Wm. IV. c. 27*, s. 42.

*Arrears of rent*:—So long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time. The right to the rent is an incident to the reversion. The Statute of Limitations does not apply except indeed

(*d*) Lord Campbell, in *Moulton v. Edmonds*, 1 D. F. & J. 250 (1859).

(*e*) 4 App. Cas. 59 (1878).

(*f*) *Oliver v. Richardson*, 9 Ves. 222 (1803).

that by the present section it prevents the recovery of arrears for more than six years (*g*).

*Section 17 refers especially to rents charged on land:—*In *Paget v. Foley* (*h*) it was considered that the statute pertained more “to rents that are a charge on the land than to mere conventional rents”; in other words was not meant to apply to rents reserved by a specialty. The object of the Act was to relieve land from arrears of charges beyond six years, but not to affect the right to a personal action (*i*).

*Annuities:—*In *Sims v. Strachan* (*j*) it was held that arrears of an annuity secured by a covenant in an indenture might be recovered after six years.

*Annuities may come under section 23 infra:—*See *Hughes v. Coles* (*k*).

*Personal annuity:—*An annuity given by will, forming no charge upon land, but being personal only, is not within section 17 (*l*).

*Money payable out of land:—*Where the interest mortgaged was the share of a married woman in the proceeds of lands devised upon trust for sale, that was held to be “money payable out of land” (*m*).

(*g*) *Archbold v. Scully*, 9 H. L. C. 375 (1861), *per* Lord Cranworth. *See Webster v. Southey*, 36 Ch. D. 19 (1887).

(*h*) 2 Bing. N. S. 688 (1836).

(*i*) *Hunter v. Nockolds*, 1 Mac. & G. 651 (1850); *see Cox v. Dolman*, 1 D. M. & G. 592 (1852). *See* R. S. O. 1887, c. 60, s. 1 (1*a*). “Actions for rents upon an indenture of demise.”

(*j*) 12 Ad. & Ell. 536 (1840). *See further James v. Salter*, 3 Bing. N. C. 532, as to dispute of title to annuity; *Wheeler v. Howell*, 3 K. & J. 189; *Sinclair v. Jackson*, 17 Beav. 405; *Vincent v. Going*, 1 J. & Lat. 697, annuity charged on reversionary interest.

(*k*) 27 Ch. D. 231 (1884). *Cf. Francis v. Grover*, 5 Ha. 39; *Ferguson v. Livingston*, 9 Ir. Eq. R. 202.

(*l*) *Roch v. Callen*, 6 Ha. 536 (1848). *Cf. Re Ashwell*, Johns. 112.

(*m*) *Bowyer v. Woodman*, L. R. 3 Eq. 313 (1867). *But see Smith v. Hill*, 9 Ch. D. 143 (1878), and the cases there discussed. *See also Bolding v. Lane*, 4 Giff. 574.

*Interest on legacies charged on land*:—Where the legacy is a simple charge on the land the seventeenth section applies (*n*); and in *Thompson v. Eastwood* (*o*) where the legacy was not merely charged upon the land, but considered an express trust (*p*) the Court applied the principle of the Statute of Limitations to the case and allowed only six years' arrears.

*Time whence interest runs on legacy*:—In a case where there was no personal estate to satisfy a legacy and it had to be realized out of the proceeds of realty, North, J., said: "In the ordinary case the Court has said that a certain rule is to be adopted in the distribution of personal estate, namely, that legacies are to be paid within a year from the date of the testator's death, from which time an unpaid legacy will carry interest. It seems to me that the same rule ought to apply in this case, and the interest ought to commence to run after the expiration of that year" (*q*).

*Interest on mortgages*:—There is a distinction between the case of a mortgagee seeking to recover arrears of interest by action (*r*) or distress and the case of a mortgagee seeking to retain the arrears out of a surplus after sale (*s*), or to receive them before suffering redemp-

(*n*) *Hughes v. Williams*, 3 Mac. & G. 613 (1850); *Chappel v. Rees*, 1 D. M. & G. 393.

(*o*) 2 App. Cas. 215 (1877). Cf. *Re Walker*, L. R. 7 Ch. 120 (1871). But see *Re Blachford*, 27 Ch. D. 676 (1884) where payment of legacy delayed until falling in of reversion.

(*p*) As to express trust, see section 24, *infra*.

(*q*) *Re Bignold*, 45 Ch. D. 498 (1890). For cases where this rule does not apply, see *Re Richards*, L. R. 8 Eq. 119 (1869), contingent legacy to infant, commented on W. N. 1872, 180; *Re Waters*, 42 Ch. D. 517 (1889), legacy payable on death of tenant for life; *Lord v. Lord*, L. R. 2 Ch. 782 (1867), legacy payable on termination of pending litigation.

(*r*) Foreclosure of realty, see *Round v. Bell*, 30 Beav. 121, *Sinclair v. Jackson*, 17 Beav. 405; *Shaw v. Johnson*, 1 Dr. & Sm. 412; as to reversionary property, *Smith v. Hill*, 9 Ch. D. 143; *Vincent v. Going*, 1 J. & Lat. 697. But see *Jordan v. Young*, 1878, W. N. 230; *Wheeler v. Howells*, 3 K. & J. 198.

(*s*) *Re Marshfield*, 34 Ch. D. 721 (1887), approving *Edmunds v. Waugh*, L. R. 1 Eq. 418. Cf. *Sutton v. Sutton*, 22 Ch. D. 511, *Fearnside v. Flint*, 27 Ch. D. 579. For Canadian cases, see *Ford v. Allan*, 15 Gr. 565; *Howern v. Bradburn*, 22 Gr. 96; *Allan v. McTavish*, 2 A. R. 278; *Macdonald v. Macdonald*, 11 O. R. 187; *McDonald v. Elliott*, 12 O. R. 98; *McCullough v. Sykes*, 11 P. R. 337.



tion (*t*), or when added as a party in the Master's office (*u*). In the former case, section 17 applies; the latter case is now governed by 56 V. c. 17 (*v*).

*Interest on mortgage of personalty*:—Section does not apply: see *Mellersh v. Brown* (*w*).

*Money paid into Court by railway, what arrears out of*:—"The next question is to what amount of arrears of interest upon his mortgages is the plaintiff entitled, and at what rate is it to be calculated? . . . This is not an action to recover arrears of interest in respect of any sum of money charged upon any land, but an action of trespass in which the value of lands of which the plaintiff has been forever deprived is recoverable as damages, and the damages so to be recovered would be held by him, as the lands were held, as security for his mortgage moneys, and the mortgagor would be put to his redemption in respect of his damages so to be recovered, as he would have been in respect to the lands which those damages represented.

"The defendants have paid the value of the lands into Court, and the question, therefore, is what arrears of interest the plaintiff is entitled to retain out of these moneys in respect of his mortgage moneys; and this is to be determined upon the same principles as if a bill had been filed by a mortgagor against a mortgagee in possession to redeem the mortgaged lands.

"The words of the statute clearly do not include an action by a mortgagor against a mortgagee to redeem the mortgaged lands, and the principle of the decisions of

(*t*) Redemption, see *Edmunds v. Waugh*, L. R. 1 Eq. 421.

(*u*) See *Greenway v. Bromfield*, 9 Ha. 201 (1857), distinguishing *Harrison v. Dingnan*, 2 Dr. & War. 295.

(*v*) See notes to R. S. O. 1887, c. 107, clause 4, schedule B.

(*w*) 45 Ch. D. 225. Cf. *Smith v. Hill*, 9 Ch. D. 143, reversionary interest in trust funds invested on mortgage. See *Hodges v. Croyden Canal Co.*, 3 Beav. 86, mortgagee of canal works; *Mellish v. Brooks*, *ib.* 22, mortgagee of turnpike tolls.

*Edmunds v. Waugh*, L. R. 1 Eq. 418, and *Re Marshfield*, 34 Ch. D. 721, shews that the statute does not apply to such a suit.

"Is a mortgagee who has been in possession of mortgaged lands from which no income was derivable for nine years to be entitled on redemption to only six years' arrears of interest? I think it plain that the statute is only applicable when the mortgagee is seeking to enforce payment out of the land of his mortgage money and interest, by action.

"The distinction between proceedings by a mortgagee and those by a mortgagor was pointed out by Vankoughnet, C., in *Caldwell v. Hall*, 9 Gr. 110; and in *Ford v. Allan*, 15 Gr. 565, he followed *Edmunds v. Waugh*.

"I am of the opinion, therefore, that the plaintiff is entitled to retain out of the moneys in Court the mortgage moneys secured by both his mortgages, . . . and all arrears thereon, and that the interest on the principal moneys thereby secured must after the date when they become payable bear interest at the rate of six per cent. per annum only. *Grant v. Peoples Loan & Deposit Co.*, 17 A. R. 85" (x).

*Interest on money secured by vendor's lien*:—Interest was recovered for more than six years in *Toft v. Stevenson* (y).

*Interest on judgment when land under fi. fa.*:—By section 88 of the Judicature Act (z), a verdict or judgment shall bear interest from the time of the rendering of the verdict or of giving the judgment. It would seem that

(x) *Delaney v. C. P. R.*, 21 O. R. 11 (1891), *Armour, C.J.* See explanation of *Edmunds v. Waugh* in *Re Stead's mortgaged estates*, 2 Ch. D. 713. Cf. *Clarke v. Henderson*, 14 Ch. D. 348, mortgage of reversionary interest in fund in court.

(y) 5 D. M. & G. 735 (1854), distinguishing *Hodges v. Croydon Canal Co.*, 3 Beav. 86.

(z) R. S. O. 1887, c. 44.

when a judgment is secured on land, it becomes a sum of money charged upon and payable out of land (a) within the meaning of section 17.

"The person by whom the same was payable :"—"These words do not denote merely the persons who are legally bound by contract to pay the interest, but all persons against whom the payment of such arrears may be enforced by any action or suit, and by whom, therefore, as they have a right to pay such interest in redemption of their land, interest may be properly said to be payable" (b).

It was the intention "to enact a plain and simple rule that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person or by some former owner from whom the interest is derived" (c).

Exception in favour of subsequent mortgagee when a prior mortgagee has been in possession.  
*Idem*, s. 42.

18. Where any prior mortgagee or other incumbrancer has been in possession of any land, or in receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. R. S. O. 1877, c. 108, s. 18.

*Explanation of section 18* :—"Inasmuch as no laches could be imputed to the mortgagee, who was unable to gain possession by reason of a prior incumbrancer being in possession, it was thought unjust to limit such mortgagee to six years of arrears, and he was enabled therefore to recover all the arrears which became due during the time that possession of the land charged was held by the prior mortgagee. No doubt the exception is a very just one

(a) *Henry v. Smith*, 2 Dr. & War. 381 (1842). Cf. *Vincent v. Going*, *supra*.

(b) *Lord Westbury in Bolding v. Lane*, 1 D. J. & S. 133 (1863).

(c) *Ib.* See *Chinnery v. Evans*, 11 H. L. C. 134 (1864).

But the reason of that exception is this, that when a prior mortgagee was *bona fide* in possession, then that possession excluded the subsequent mortgagee from being enabled to recover rents, or to recover lands, or to enter into possession. But it would be a gross misapprehension of that section if we were to apply it to a case where the legal holder of a defunct or satisfied charge or incumbrance or of an existing charge or incumbrance, is not himself actually in possession, or in receipt of the rents and profits, but where an individual is in that possession or in that actual receipt, who is entitled by a trust declared in equity to the benefit of that outstanding charge or incumbrance"(*d*).

"The exception is where a man has one estate and there are several incumbrances on it, and one of the incumbrancers enters into possession, then another creditor shall not be prejudiced by that possession, if he come for relief within a year after the prior creditor has been removed from the possession"(*e*).

*Judgment creditor may be the prior incumbrancer* :—  
"Suppose a judgment creditor has the first security upon the estate and he gets into possession, is he not a prior incumbrancer in possession within this proviso? No one can dispute the point"(*f*).

MORTGAGES AND CHARGES ON LAND.

19. Where a mortgagee has obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an

Mortgagor to be barred at end of ten years from the time when the mortgagee took

(*d*) Lord Westbury in *Chinnery v. Evans*, 11 H. L. C. 136 (1864).

(*e*) Sugden, L.C., in *Vincent v. Going*, 1 J. & Lat. 701 (1844), holding that judgment creditor of remainderman in fee not entitled to exception while tenant for life in possession. See also *Drought v. Jones*, 2 Ir. Eq. Rep. 303, commented on, Sugd. R. P. Statutes, 146 (*n*), *Wheeler v. Howell*, 3 Ka. & John. 198; *Montgomery v. Southwell*, 2 Conn. & Law, 263.

(*f*) *Henry v. Smith*, 2 Dr. & War. 390 (1842); Sugden, L.C.

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c. 27, s. 28;  
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V. c. 57, s. 7.

acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him; and in such case no such action shall be brought, but within ten years next after the time at which acknowledgment, or the last of such acknowledgments, if more than one was given. R. S. O. 1877, c. 108, s. 19.

*What is a mortgage within this section?*—It is not material that the mortgage is in the form of a trust for sale (*g*), and this section applies not to land alone, but also to the proceeds of a sale whether under power (*h*) or under a trust for sale (*i*).

*Possession must be acquired by mortgagee, qua mortgagee*:—"In the work of one of the earliest and best commentators on the Statutes of Limitations, that of the late Mr. Hayes (*j*), a book which may be safely quoted and acted upon as authority if any text writer may be so trusted, in considering the 28th section of the statute (*k*), that learned writer says:—'The possession of the mortgagee must have been gained by him in *that* character: if therefore, he purchase the equity of redemption, and enter into possession, he cannot set up that possession, as the possession of a *mortgagee*, in answer to the claims of persons seeking to impeach his title as purchaser.' And after citing cases he adds further on: 'In order to constitute a case, within either the new enactment or the old equitable doctrine, there must be the diligence of a mortgagee on the one hand, and the laches of a mortgagor on the other.' If this is a correct statement of the law, and I accept it as such, it is decisive in favour of the plaintiffs who, not having lost their right to set aside the sale either

(*g*) *Looking v. Parker*, L. R. 8 Ch. 30 (1872).

(*h*) *Chapman v. Corpe*, 41 L. T. 22 (1879).

(*i*) *Re Alison*, 11 Ch. D. 284 (1879).

(*j*) *Treatise on Conveyancing*, 5th Ed. Vol. I. p. 277.

(*k*) Corresponding to present section, 19.

by laches or acquiescence, cannot be barred from redeeming by the operation of the statute on a possession which was never taken or held by the defendants or their authors in the character of mortgagees "(l).

*Can solicitor of mortgagor be deemed mortgagee in possession?*—"If a solicitor, with or without the consent of his client, pays off a mortgage debt of his client, he does not thereby alter the relation between them; nor, if he receives the rents can he be accounted a mortgagee in possession "(m).

*The possession of mortgagees passes to their assigns:—*In *Bright v. McMurray* (n) it was held that the benefit of the possession held by the mortgagees, without any written acknowledgment of the mortgagor's title, passed to the grantees from the mortgagees, and coupled with their own subsequent possession for the necessary period conferred on them, by virtue of the statute, a title absolute as against the mortgagor.

*Distinction between rights of entry of mortgagor and mortgagee:—*In the recent case of *Cameron v. Walker* (o), the curious result was arrived at that a mortgagor might be barred by the statute, while his mortgagee could still be within the statutory period. "It had been taken for granted in expressions used in some cases (though not so decided) that if the statute has begun to run in favour of the occupant prior to the owner mortgaging the property, it will continue to run as against the mortgagee. But the decision in *Heath v. Pugh*, 6 Q. B. D. 345, and 7 App. Cas.

(l) *Strong, J.*, in *Faulds v. Harper*, 11 S. C. R. 655 (1886). Cf. *Hyde v. Dallaway*, 2 Ha. 528 (1843), mortgagee purchasing interest of tenant for life. *Rafferty v. King*, 1 Keene, 601 (1836), mortgagee in possession *qua* purchaser of equity.

(m) *Ward v. Carttar*, L. R. 1 Eq. 29 (1865). Cf. *Booth v. Purser*, 1 Ir. Eq. R. 33, as to possession by husband as mortgagee of wife's separate estate.

(n) 1 O. R. 172 (1882).

(o) 19 O. R. 212 (1890).

235, has placed in clear light the relations of mortgagor and mortgagee, and since the Judicature Act, the equitable doctrine prevails.

"By that doctrine, the conveyance of the legal estate to the mortgagee was regarded merely as security for a debt, and upon the mortgagee's death, both debt and security passed to the executor. The interest in the land is not in the mortgagee, but remained in the mortgagor. Possession might be taken by the mortgagee upon default, but that is a very distinct and different thing from possession as owner of the estate. The title of the mortgagee is an equitable title; the right of possession upon that mortgage title first accrues after the making of the mortgage; and the Statute of Limitations *quoad* possession of the land, can only run from that time.

"The right of entry exercisable by the mortgagee, is a very different and distinct thing from the right of entry still remaining in the mortgagor. If, before the right of entry under the mortgage is barred by the statute, proceedings are taken to foreclose or sell under the power of sale contained in the mortgage, the completion of such foreclosure or sale vests a new absolute title as owner in the then holder of both legal and equitable estates reunited, from which would arise a new point of departure in the running of the Statute of Limitations against any occupant of the land.

"The right to proceed in equity on the mortgage would first accrue after the making of the mortgage, and as soon as default arose, and it is an eminently reasonable construction to give to the Statute of Limitations that the right to enter upon the land first accrues to the mortgagee at the same time" (p).

(p) *Ib. per* Boyd, C., at p. 221. See 13 C. L. T. 85. (Article by Mr. A. C. Galt).



*Purchase from mortgagee under power of sale:—*  
“Under the authorities of *Heath v. Pugh* (q) and *Doe d. Baldeley v. Massey* (r), there appears to me strong ground for saying that the statute first commenced to run against the purchaser under this power of sale, when he so acquired his title; but it is not necessary to decide this” (s).

*Effect of suit for administration of estate of 2nd mortgagee:—*Where an action was brought for administration of the estate of a second mortgagee it was sought to shew that this operated as a suit to redeem the first mortgagee (who otherwise would have title by possession) and so stopped the currency of the statute in his favour. This view was not adopted by the Court, as in the first place the first mortgage debt was not the debt of the second mortgagee; and even “had the case been otherwise, it would by no means follow, because a suit had been instituted which would arrest the operation of the statute against the debt, that therefore its operation in favour of the mortgagee against the estate must be arrested. If the mortgagee is not a party, and the bill does not seek redemption, it is *res inter alios acta*, and why should the mortgagee’s title be affected” (t).

*What is sufficient acknowledgment by mortgagee?—*  
The subject of acknowledgment has already been discussed in general, under section 13 *supra*. It remains to add here what more particularly pertains to acknowledgment by the mortgagee: Where a mortgagee in possession wrote to the holder of the equity: “The amount due me . . . was as follows: . . . No part of that sum has since been paid to me, but the rents I have received have merely kept

(q) 7 App. Cas. 200 (1882).

(r) 17 Q. B. 373 (1851).

(s) Ferguson, J., in *Cameron v. Walker*, 19 O. R. 229 (1890). See 13 C. L. T. 121, 129 (letter by Mr. Luscombe and editorial thereon).

(t) 8 Gr. 340 (1860).

down the interest," this was held a sufficient acknowledgment to give a new starting point to the Statute of Limitations" (u).

*Acknowledgment to third person*:—An acknowledgment by the mortgagee of the title of the mortgagor, made to a third person is of no benefit to the mortgagor (v); as where a mortgagee in a deed to a purchaser conveyed subject expressly to the equity of redemption (w).

*Accounts kept by mortgagee*:—A point was raised but not decided in *Baker v. Weston* (x), whether the statutory bar was not defeated by the mortgagee keeping accounts of the rents received by him from the mortgaged premises. In *Re Allison* (y) the following statement was made in the argument: "The mortgagee in possession may, if he pleases, continue to be so, and it may be advantageous to him. Here he has kept accounts as such, and that is payment of interest under section 40" (z). The mortgagor was held barred but the judgments do not treat of the point in question.

*Possession of part of estate by mortgagee*:—See *Kinsman v. Rouse* (a).

*Can time be extended by terms of original mortgage contract*?—See *Alderson v. White* (b).

(u) *Miller v. Brown*, 3 O. R. 210 (1882). Cf. the Letters written in *Richardson v. Younge*, L. R. 10 Eq. 275 (1870); *Thompson v. Bowyer*, 11 W. R. 975; *Trulock v. Robey*, 12 Sim. 402 (1841).

(v) *Batcheler v. Middleton* 6 Ha. 83 (1847).

(w) *Lucas v. Dennison*, 13 Sim. 584 (1843). Cf. *Markwick v. Hardingham*, 15 Ch. D. 339 (1880), effect of letter to bankrupt mortgagor.

(x) 14 Sim. 426 (1845).

(y) 11 Ch. D. 293 (1879).

(z) Our section 23. Citing *Brocklehurst v. Jessop*, 7 Sim. 438.

(a) 17 Ch. D. 104 (1881), not followed in *Faulds v. Harper*, 2 O. R. 405; see also *Hood v. Easton*, 2 Giff. 692.

(b) 2 DeG. & J. 97, 109 (1858).

*Disabilities of mortgagor:—See Faulds v. Harper (c); Kinsman v. Rouse (d); Forster v. Patterson (e).*

*Effect of bankruptcy on mortgagor's rights:—“See Markwick v. Hardingham (f).*

20. In case there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons. R. S. O. 1877, c. 108, s. 20.

Acknowledgment to one of several mortgagors. Imp. Act. 3-4 Wm. IV. c. 27, s. 28.

*The equity of redemption is an entire whole:—In Faulds v. Harper (g) where some of the mortgagees, having been under disabilities were entitled to redeem, it was considered that the mortgagee must suffer redemption of the whole property on payment of the whole mortgage debt:—“There is no principle on which the mortgage money could be apportioned in such a case, and the mortgagee compelled to receive a proportionate part according to the value of that part of the estate which the mortgagor retained in possession; and paying the whole sum secured, the mortgagor can only have justice done to him by having returned to him the whole security. I find nothing in the statute against this mode of working out the redemption which is that authorized by Rakestraw v. Brewer (h).*

21. In case there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees, or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or per-

Acknowledgment by one of several mortgagees. Imp. Act 3-4 Wm. IV. c. 27, s. 28.

(c) 2 O. R. 405; 11 S. C. R. 655 (1886), *per* Strong, J.

(d) *Supra*.

(e) 17 Ch. D. 132 (1881), not followed in *Faulds v. Harper*, 2 O. R. 405, which follows *Caldwell v. Hall*, 8 U. C. L. J.; 9 Gr. 110.

(f) 15 Ch. D. 339 (1880).

(g) *Per* Strong, J., 11 S. C. R. 656 (1886). See also *Ib.* 2 O. R. 411.

(h) Select cases in Ch. 53, *Moseley*, 189 (*Rackstraw v. Bruyer*).

sons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage. R. S. O. 1877, c. 108, s. 21.

*Acknowledgment by one of two joint mortgagees:—See Richardson v. Yonge (i), where such an acknowledgment held inoperative.*

**Mortgagee**  
may enter or  
sue within  
ten years  
from last  
payment.  
Imp. Act, 7  
Wm. IV. &  
1 V. c. 28.

22. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued. R. S. O. 1877, c. 108, s. 22.

**Money**  
charged  
upon land  
and legacies  
to be deemed  
satisfied at  
the end of  
ten years if  
no interest  
paid or ac-  
knowledg-  
ment given  
in writing  
in the mean-  
time.  
Imp. Acts,  
3-4 Wm. IV.  
c. 27, s. 40;  
and 37-38 V.  
c. 57, s. 8.

23. No action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same unless in the meantime some part of the principal money, or some interest thereon has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent; and in such case no action or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given. R. S. O. 1877, c. 108, s. 23.

(i) L. R. 6 Ch. 478 (1871).

*Origin and object of section 22*:—Section 22 was enacted by the Real Property Amendment Act, 1874, s. 12. Spragge, C., said of it: "There was no such provision in the original Real Property Act, 4 Wm. IV. c. 1; and the Act, 16 V. c. 121, was passed to introduce a similar provision, the limitation then being twenty years; this was in 1853. An Act with the like provision had been passed in the Imperial Parliament in 1837, there having been no such provision in the English Real Property Act of 1833, 3 & 4 Wm. IV. c. 27, so that the legislation in Canada upon this subject followed and conformed to the legislation in the Imperial Parliament. The Imperial Act of 1837, and our own Act of 1853, were passed specially, as appears by the recitals, to clear up doubts which had arisen upon the construction of the previous Acts" (j).

*Change effected by section 23*:—Under the old Statute of Limitations, 21 Jac. I., the possession of the mortgagor was if possible construed as permissive and not adverse; and therefore as not barring the mortgagee. But even apart from the present section it would have been presumed (in the absence of facts rebutting the presumption, such as payment of interest or entry by the mortgagee), that the money was paid at the day, and after the lapse of the statutory period the mortgage would have been presumed to have been satisfied (k). The principle change, then effected by section 23 is to strengthen the presumption of satisfaction and also in great part to do away with the refined distinction of adverse from non-adverse possession.

*Statute operates a re-conveyance to mortgagor, etc.*:—In accordance with the principles laid down by Jessel, M.R., in *Dawkins v. Penrhyn* (l) it has been held that when the

(j) *Hooker v. Morrison*, 28 Gr. 372 (1881). Cf. *Doe v. Williams*, 5 Ad. & Ell. 297 (1836).

(k) *Doe Dunlop v. McNab*, 5 U. C. R. 289 (1849); *Doe McLean v. Fish*, *ib.* 295; *Doe McGregor v. Hawke*, 5 O. S. 496 (1837).

(l) See under section 15, *supra*.

right of action for entry or foreclosure is taken away, the title of the mortgagee is extinguished and by virtue of the statute a parliamentary re-conveyance of the whole right, title, estate and interest of the mortgagee is made to the mortgagor or his assigns (*m*).

*"Claiming under a mortgage"*:—Where a purchaser took a conveyance in which both mortgagor and mortgagee joined, he was held to be a person "claiming under a mortgage" within the meaning of section 22 (*n*).

*No action : Foreclosure*:—Foreclosure being an action for the recovery of land, it was held that where the mortgagee ten years and eight months after default claimed payment of the mortgage debt, possession and foreclosure, he was only entitled to judgment upon the covenant (*o*). But where a decree of foreclosure was obtained before the lapse of the statutory period, and an action for possession after the lapse of the same period it was held that the right to bring such an action accrued at the date of the decree (*p*).

*Action on the covenant*:—Our Courts in Ontario have consistently refused to consider the action on the covenant as within section 23. Thus Mr. Justice Rose, in *McDonald v. Elliott* (*q*) says: "If I felt bound to consider whether *Sutton v. Sutton*, 22 Ch. D. 511, should bind me, there are some questions of interest which I would wish to hear fully argued before arriving at a decision, but I find Mr.

(*m*) *Court v. Walsh*, 1 O. R. 170 (1882) *per* Boyd, C., citing *Heath v. Pugh*, 6 Q. B. D. 345, 364. See *Harty v. Davis*, 13 Ir. L. R. 23 as to effect of acknowledgment after statutory period. Cf. *Warring v. Warring*, 5 Ir. Ch. R. 6; *Homan v. Andrews*, 1 Ir. C. R. 106; *Gregon v. Hindley*, 10 Jur. 383 (1846) case of reversioner and tenant for life.

(*n*) *Doe Baddeley v. Massey*, 17 Q. B. 373 (1851).

(*o*) *Fletcher v. Rodden*, 1 O. R. 155 (1882). See *Barwick v. Barwick*, 21 Gr. 39 (1874); *Harlock v. Ashberry*, 19 Ch. D. 539.

(*p*) *Pugh v. Heath*, 7 App. Cas. 235 (1882). See *Hugill v. Wilkinson*, 38 Ch. D. 480; *Re Lake*, 63 L. T. 416; *Henry v. Smith*, 2 Dr. & War. 391, as to mortgage of reversionary interest.

(*q*) 12 O. R. 98 (1886).



Justice Proudfoot in *Macdonald v. Macdonald*, 11 O. R. 187, at p. 190, declined to follow *Sutton v. Sutton*, and followed *Allan v. McTavish*, 2 A. R. 278, as the decision of the highest appellate tribunal of this Province" (r). Even in England the statute does not bar an action against a surety for the mortgagor on a covenant (s), or promissory note (t), or bond (u).

*Satisfaction of mortgage not presumed merely because no remedy on covenant* :—"The mere fact that the mortgagee could not recover the money on the covenants contained in the mortgage, because twenty years had passed from the time fixed for its payment, will not establish a payment so as to reconvey the legal title to the mortgagor" (v).

*Judgment* :—"If the change in the section to be presently noticed had not been made in the revision of 1887, we should probably have found ourselves compelled in obedience to the general rule laid down by the Privy Council in *Trimble v. Hill*, 5 App. Cas. 342, and *City Bank v. Barrow*, 5 App. Cas. 664, to follow the case of *Jay v. Johnstone* [1893] 1 Q. B. 189, in which the Court of Appeal, dealing with a section verbally identical in this respect with the section of our Act as it formerly stood, and also with other Imperial Acts, similar to those in force here, which were considered by our Court in *Boice v. O'Loane*, came to a conclusion diametrically opposite to that decision. In confirming the statute law revision of 1887, the legislature has, however, adopted the law as laid down in *Boice v. O'Loane* (w), by omitting the word 'judgment' altogether

(r) But see 56 V. c. 17 at p. 260, *supra*. See also *Reeves v. Butcher* [1891] 2 Q. B. 509, as to effect of acceleration clause.

(s) *Re Frisby*, 43 Ch. D. 106 (1889).

(t) *Re Wolmerhausen*, 62 L. T. 541 (1890).

(u) *Re Powers*, 30 Ch. D. 291 (1885).

(v) *Mahar v. Fraser*, 17 U. C. C. P. 414 (1867), decided before enactment of s. 22.

(w) 3 A. R. 167.



from section 23, as revised in R. S. O. c. 111, so that there is no longer anything in that section which in terms includes judgments, or to which the reasoning of the English decision can apply. *Jay v. Johnstone* is also reported in [1893] 1 Q. B. 25 (x), and follows the case of *Hebblethwaite v. Peever* [1892] 1 Q. B. 124.

"The only Limitation Act, therefore, which can apply to a judgment regarding it as a specialty (as to which see the cases last cited and *McMahon v. Spencer*, 13 A. R. 430) is R. S. O. c. 60, s. 1" (y).

*Charge for local improvements*:—See *Hornsey v. Monarch Investment Co.* (z).

*Vendor's lien*:—A vendor's lien for purchase money is within this section (a).

"Money charged upon or payable out":—See notes to s. 17, *supra*, also *Bowyer v. Woodman* (b); *Roddam v. Morley* (c); *Re Stephens* (d).

*Legacy, how far within section 23*:—A legacy is *prima facie* within section 23: "A legacy does not cease to be a legacy because it is subject to some implied trusts. An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own, but such a trust does not take the case out of the statute. An executor cannot be deprived

(x) Also in [1893] 4 R. 196.

(y) *Osler, J.A.*, in *Mason v. Johnston*, 20 A. R. 412 (1893).

(z) 24 Q. B. D. 1 (1889), time runs from completion of work, not apportionment of expenses.

(a) *Toft v. Stephenson*, 7 Hare 1 (1848).

(b) L. R. 3 Eq. 313 (1867), interest in proceeds of lands devised upon trust for sale. Cf. *Mutlow v. Bigg*, L. R. 18 Eq. 246 (1874), distinguishing *Pawsey v. Barnes*, 20 L. J. Ch. 393 (1851) s. 23, does not apply to part of lands remaining unsold.

(c) 1 DeG. & J. 1 (1857), money due on a bond is not within s. 23. Cf. *Morley v. Morley*, 5 D. M. & G. 610 (1855).

(d) 43 Ch. D. 39 (1889), effect of charging simple contract debts on land.

of the benefit of the statute by shewing that he is a trustee; it is necessary to make out that he is an express trustee" (e).

*Legacy not charged on land is within section 23*:—Not only legacies charged on land, but legacies payable only out of personal estate are included (f).

*Legacy includes residue or share thereof*:—See *Christian v. Devereux* (g).

*Charge of debts will not revive barred legacy*:—Where a legacy unpaid by the executor has been barred by lapse of time, a charge of debts by the executor in his own will will not revive the debt (h).

*Former rule as to legacies*:—Formerly the Statute of Limitations did not apply to legacies but the Courts acted on the principle, "that claims the most solemnly established upon the face of them will be presumed to be satisfied after a certain length of time" (i).

*Legacy, present right to receive*:—"The right to receive means the right to receive from the executor or administrator or their representatives, and not from the debtor to the estate, from whom the legatee or next of kin has no right to receive. The right to a legacy, and the right to

(e) *Lindley, L.J.*, in *Re Jane Davis, Evans v. Moore* (1891), 3 Ch. 119.

(f) *Shepherd v. Duke*, 9 Sim. 567 (1839), followed in *Henry v. Smith*, 2 Dr. & War. 391 (1842). Cf. *Re Stephens*, 43 Ch. D. 45 (1889); *Cadbury v. Smith*, L. R. 9 Eq. 42 (1869), following *Scott v. Jones*, 4 Cl. & Fin. 382, gift in trust to executor to pay debts and legacies no bar to statute; *Charlton v. Durham*, L. R. 4 Ch. 433 (1869), after administration of estate executors become trustees; *Harcourt v. White*, 28 Beav. 309 (1860), distinguishing *Phillips v. Munnings*, 2 Myl. & Cr. 309, investing of legacy as separate fund makes executors trustees; so too, the signing of a declaration of trust, *Tyson v. Jackson*, 30 Beav. 386 (1861), *Re Rowe*, 61 L. T. 581 (1889); *Playfair v. Cooper*, 17 Beav. 187 (1853); *Banner v. Berridge*, 28 Ch. D. 254 (1881), express and constructive trust; *Swain v. Bringeman*, L. R. 1891, 3 Ch. 233.

(g) 12 Sim. dictum, at p. 271 (1841). Cf. *Prior v. Horniblow*, 2 Y. & Coll. 200.

(h) *Piggott v. Jefferson*, 12 Sim. 26 (1841).

(i) *Jones v. Turberville*, 2 Ves. Jun. 11, 13 (1792), case of delay of over 40 years; *Higgins v. Crawford*, *ib.* 571 (1795), arrears more than 6 years; *Pickering v. Stamford*, *ib.* 582 (1795), observations on "stale demands." *Campbell v. Sandford*, 2 Cl. & Fin. 450 (1834), lapse of 27 years.

receive a legacy are, (as was pointed out by Lord Romilly in *Earle v. Bellingham* (j), obviously distinct rights. And the observation applies equally to a share of the residue of an intestates' estate. But the enactments speak not merely of a right to receive, but emphatically of a present right to receive. The next of kin have no present right to receive from the administrator a reversionary asset belonging to the intestate, before it falls into possession and is possessed by him, nor when he is compelled to take proceedings to recover an outstanding asset before he recovers it or obtains possession of it" (k).

*Present right to receive*:—By the words "a present right to receive" are understood an immediate right without waiting for the happening of any future event (l).

*After a present right accrued*:—In case of a proviso for redemption if the mortgagor shall "on demand" pay the debt and interest from the date of the deed the statute runs from the date of the deed, unless the promise is to pay a collateral sum on demand, in which case no right of action accrues until demand (m).

*Mortgage without re-demise, when right to enter accrues*:—Where a mortgage does not contain a re-demise to the mortgagor and no interest has been paid in the meantime, the statute has been held to run against the mortgagee from the execution of the mortgage (n).

(j) 24 Beav. 448.

(k) Chitty, J., in *Re Johnson*, *Sly v. Blake*, 29 Ch. D. 971 (1885). Cf. *Hornsey v. Monarch*, 24 Q. B. D. 10 (1889); *Benson v. Maude*, 6 Mad. 15 (1821), immediate legacy; *Ludlam v. Ludlam*, 63 L. T. 332 (1891), proceeds of reversionary interest; *Adams v. Barry*, 2 Coll. C. C. 290 (1845); *Larkins v. Phipps*, [1873] W. N. 207; *Bright v. Larcher*, 27 Beav. 130 (1859), residuary interest in annuity; *Faulkner v. Daniel*, 3 Hare 199, 212 (1843); *Ravenscroft v. Frisby*, 1 Coll. C. C. 16 (1844); *Proud v. Proud*, 11 W. R. 101, legacies subject to prior charges; *Boldero v. Halpin*, 19 W. R. 320 (1870); *Piggott v. Jefferson*, 12 Sim. 26 (1841), persons under disability.

(l) *Farran v. Beresford*, 10 Cl. & Fin. 334 (1843). See further *Ryan v. Cambie*, 2 Ir. Eq. R. 334; *Dillon v. Cruise*, 3 Ir. Eq. R. 82.

(m) *Re Brown's Estate* [1893] 3 R. 463; 2 Ch. 300, following *Birks v. Trippet*, 1 Wms. Saund. 33a.

(n) See *Doe v. Lightfoot*, 8 M. & W. 564 (1841). Cf. *Doe v. Giles*, 5 Bing. 421 (1829); *Thorp v. Facey*, 12 Jur. N. S. 741 (1866).

*Where lands vacant and no re-demise:*—The presumption of payment of the mortgage moneys after the statutory period does not arise where the land was vacant at the execution of the mortgage and the mortgage contains no re-demise clause; the mortgagee in that case being deemed in possession of the land by operation of law (*o*).

*Payment by whom made:*—In *Lewin v. Wilson* (*p*), H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation; the latter as between the debtors being surety only, H. being bound to pay principal and interest and expressly named as a person entitled to redeem both mortgages. The question then arose were payments by H. sufficient to bind W. so as to prevent the running of the statute in his favor. The Judicial Committee, after reviewing the meanings given to "payment" in *Harlock v. Ashberry* (*q*) and *Chinnery v. Evans* (*r*), concludes:—"In expounding the word 'payment' learned judges have used such expressions as were calculated to shew in the case before them that the payment relied on was or was not the payment meant by the statute. In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage, are payments which by section 30 (*s*) give a new starting point for the lapse of time. And H. was clearly such a person."

(*o*) *Mahar v. Fraser*, 17 U. C. C. P. 408 (1867). Cf. *Delaney v. C. P. R. Co.*, 21 O. R. 11 (1891).

(*p*) 11 App. Cas. 639 (1886).

(*q*) 19 Ch. D. 539 (1882), case of payment by tenant.

(*r*) 11 H. L. C. 115, payments by receiver appointed at instance of mortgagee.

(*s*) C. S. N. B. c. 84, s. 30. Cf. sections 22 and 23, *supra*.

The conclusion come to in *Harlock v. Ashberry, supra*, was that a statutory payment must be by a person liable or at least entitled to pay.

The principle laid down by Gwynne, J., in the Supreme Court that the only person by whom a payment can be made to stay the currency of the statute, is the mortgagor or some person in privity of estate with him or the agent of one of them, was qualified by the Judicial Committee so as to include one who by the terms of the mortgage contract is entitled to make payments (*t*).

*By whom payment may be made—Distinction between sections 22 & 23:—*In *Trust and Loan Co. of Canada v. Stevenson (u)*, where a subsequent mortgagee took the property from the assignee in insolvency and made payments on the first mortgage till within ten years of the bringing of the action for foreclosure, it was held that as the subsequent mortgagee was under the circumstances primarily bound to pay off the prior incumbrances that therefore his payments kept alive the plaintiff's rights. As expressed by Maclellan, J.A. (*v*). "The present action is also one of foreclosure, and therefore we must hold that the case is governed by section 22 and not by section 23 so far as there may be any difference between the two sections as to the class of persons by whom valid payment may be made of principal money and interest. It is true that in making the revision of 1887, section 23 was altered from

(*t*) *Lewin v. Wilson*, 11 App. Cas. 647 (1886). See further *Linsell v. Bonson*, 2 Bing. N. C. 245 (1835). *Homan v. Andrews*, 1 Ir. Ch. R. 106, payments by mere stranger; *Chinnery v. Evans, supra*, payments by receiver of mortgagor; *Cockburn v. Edwards*, 18 Ch. D. 457 (1881) *per* Jessel, M.R., receipts of mortgagee in possession do not constitute payments by mortgagor; *Staley v. Barrett*, 26 L. J. Ch. 321 (1857), surplus of annuity assigned by mortgagor as collateral held sufficient to keep charge alive; *Seager v. Aston, ib.* 302, payments by surety on collateral security; *Ames v. Mannering*, 26 Beav. 583 (1859), payments by widow binding on heir; *Thwaites v. McDonough*, 2 Ir. Eq. R. 97, payments for infants in foreclosure action.

(*u*) 20 A. R. 66 (1892), reversing 21 O. R. 571; *Osler, J.A.*, dissenting.

(*v*) At p. 80; citing *Lewin v. Wilson, supra*.

the form in which it had stood from the year 1834, when it was first enacted, by the insertion in the second line of the words 'out of any land or rent.' I think, however, these words make no difference in a case of foreclosure, the one section still relating to actions for the recovery of land, and the other to actions for the recovery of money. It cannot now be contended that payment by a mere stranger will do. He must be a person who has some right to pay and whose payment the mortgagee could not properly refuse."

*Payments by mortgagor after he has assigned the equity*:—The assignee of an equity will not be deprived of the benefit of the statute by payments made by the mortgagor (*w*). On the other hand it seems that payments by the assignee will keep alive the action on the covenants against the mortgagor (*x*).

*Payments by tenant for life of the equity*:— See *Barclay v. Owen* (*y*).

*Effect of payment, etc., by one joint owner of equity*:— See *Pears v. Lang* (*z*), following *Roddam v. Morley* (*a*), where it was held that "where a part payment or payment of interest has been made which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty.

(*w*) *Newbould v. Smith*, 33 Ch. D. 127 (1886).

(*c*) *Dibb v. Walker*, [1893] 3 R. 474; 2 Ch. 429.

(*y*) 60 L. T. 223 (1889), mortgage kept alive by payment by tenant for life; *Gregson v. Hindley*, 10 Jur. 383 (1846), effect of tenant for life admitting that payments made; *Loftus v. Swift*, 2 Sch. & Lef. 642 (1806), laches of mortgagee as against tenant for life do not prejudice mortgagee as against remainderman, followed in *Wrixon v. Vize*, 2 Dr. & War. 203 (1842). See further, *Beckett v. De la Cour*, 11 L. R. Ir. 187, in *Re Fitzmaurice*, 15 Ir. C. L. R. 445.

(*z*) L. R. 12 Eq. 41 (1871). See also *Toft v. Stephenson*, 1 D. M. & G. 40.

(*a*) 1 DeG. & J. 1 (1857), but where the portions are separable, see *Dickinson v. Teesdale*, 1 D. J. & S. 52 (1862), devise subject to charge of debts of one part to A. and another to B., and payment by A.



*Agent to pay interest* :—Payments by one who some time previously had acted as solicitor for the person in possession will not necessarily bind such person without further proof of agency (*b*).

*Payment to second mortgagee by solicitor of first mortgagee* :—*Thorne v. Hurd* (*c*), was a rather curious case where the first mortgagee sold under power employing his solicitor to conduct the sale. The surplus was taken to himself by the solicitor who kept paying the interest to the second mortgagee as if the second mortgage were still existing. After the statutory period had run, the solicitor became bankrupt and the second mortgagee sought to assert that these payments of interest kept the charge alive as against the first mortgagee. The Court, however, held the second mortgagee barred.

*Payment of interest to mortgagee—Third person in possession* :—"The defendant's counsel contend that the enactment must be confined to the case where the mortgagor has himself been and continued in possession of the mortgaged premises, or might himself maintain an ejectment against a tenant in possession; and we are told that its object was to remove a doubt whether, where the mortgagor had been allowed to remain in possession more than twenty years after the forfeiture of the mortgage by default in repaying the mortgage money, although the interest on the mortgage continued to be regularly paid, the mortgagee could maintain an ejectment against the mortgagor or his tenants. But we must learn the object of the Legislature from the language of the statute; and it clearly appears to have been, to make mortgages an available security, where they were good and valid in their

(*b*) *Newbould v. Smith*, 33 Chy. D. 127 (1886); see 14 App. Cas. 423. This case further deals with the question how far a payment of interest entered in a diary by the deceased mortgagee is afterwards admissible as a proof to prevent the currency of the statute.

(*c*) L. R. [1893] 3 Ch. 530.



inception, and the mortgagee, having received payment of his interest, cannot be charged with any laches" (d).

*Difference between payment and acknowledgment:—*

"It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding v. Lane* (e) be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas, payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights, but not so if he only receives acknowledgment. If, therefore, we find that the legislature has used different language about the two cases we must not readily conclude that it has done so by accident or without meaning it" (f).

*By whom acknowledgment may be given:—*"All that the Act requires is that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent" (g). Thus an acknowledgment given by a trustee or his agent is sufficient to bind the trust estate although such acknowledgment will not impose upon the trustee any personal liability (h).

(d) Lord Campbell in *Doe Palmer v. Eyre*, 17 Q. B. 366 (1851), quoted in *Hooker v. Morrison*, 28 Gr. 373 (1881). See also *Chamberlain v. Clark*, 14 456 (1881); *Ford v. Ager*, 2 H. & C. 279 (1863). But see *Hemming v. Blanton*, 42 L. J. C. P. 158, payment after lapse of period.

(e) 1 DeG. J. & S. 122.

(f) *Lewin v. Wilson*, 11 App. Cas. 645 (1886).

(g) *Lord St. John v. Boughton*, 9 Sim. 225 (1838).

(h) *Ib.* Cf. *Toft v. Stephenson*, 1 D. M. & G. 28 (1851), acknowledgment by attorney of trustee.

*Acknowledgment by tenant for life*:—See *Re Fitzmaurice* (i).

*Agency, proof of*:—While by section 23 the acknowledgment itself must be in writing, it is not necessary for the authority of the agent to be a written authority. "The question of whether a person is an agent of the debtor, having authority to make an acknowledgment on his behalf is usually a mere question of fact (j), but sometimes such agency will be inferred from the relation between the parties or other circumstances" (k).

*Acknowledgments to whom*?—"The next question is whether it is an acknowledgment to the person entitled thereto or his agent. The cases show that the Court has not, in that respect, restricted itself within narrow limits. If it be made in a schedule (l), affidavit (m), or answer it is sufficient, although it may be said that in those cases it is made to the Court and not to the party. The decisions are, I think right; they proceed upon a liberal, but yet a fair and just construction of the statute" (n).

*Will acknowledgment to mortgagor by third person in possession save mortgagee*?—An acknowledgment of title by a person in possession of land, given to a mortgagor, is sufficient to prevent the occupant acquiring title under the statute, so as to bar the rights of the persons entitled. For this purpose it is not necessary that the mortgagor should be acting as agent of the mortgagee; the mortgagor for such purpose is a person entitled under the statute (o).

(i) 15 Ir. Ch. R. 445; see also *Bickell v. De la Cour*, 11 L. R. Ir. 187.

(j) Citing *Rew v. Pettet*, 1 Ad. & E. 196, 199.

(k) *Hewitt on Limitations*, 41, citing *Gregor v. Parker*, 1 Camp. 394. *Anderson v. Sanderson*, Holt. 591. See also *Coles v. Trecothick*, 9 Ves. 250 (1804).

(l) Cf. *Barrett v. Birmingham*, 4 Ir. Eq. R. 537; *Morrrough v. Power*, 5 Ir. L. R. 494; *Hanen v. Power*, 8 Ir. L. 505.

(m) Cf. *Tristram v. Harte*, 1 Long & T. 186.

(n) *Blair v. Nugent*, 3 J. & Lat. 677 (1846), *Sugden*, L.C.

(o) *Hooker v. Morrison*, 28 Gr. 369 (1881).

*Re Filz.*

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*Acknowledgment, how made:—*By will, see *Millington v. Thompson* (p). By correspondence, *Joslin v. S. E. R. Co.* (q).

*Acknowledgment must be intentional:—*There is authority for the proposition that for an acknowledgment to take a demand out of the statute it must appear to have been made with a view of rendering the party making it liable to the demand and it must have been made to the party entitled to make the demand. Thus where certain letters had been written by one executor not for the purpose of charging himself, but of throwing the burden of payment on the co-executor, they were held not an acknowledgment (r).

*Mortgagor and mortgagee the same:—*See *Topham v. Booth* (s).

*Effect of insolvency of mortgagor:—*In *Court v. Walsh* (t) it was argued that the effect of the insolvency of the mortgagor was to suspend the running of the Statute of Limitations, and that the assignee became a trustee for the benefit of all creditors. This was answered by *Boyd, C.*:—"To this I quite agree so far as the [mortgagee] is a creditor under his covenants in the mortgage, but it does not follow that the lien and security of the mortgagee on the land mortgaged is affected by the insolvency. On the contrary the reverse has been held in *Henderson v. Kerr*, 22 Gr. 91, and there is nothing in the facts of this case to lead me to depart from that authority."

(p) 3 Ir. Ch. R. 236.

(q) 6 D. M. & G. 270 (1854). Cf. *Vincent v. Willington*, 4 Long. & T. 456.

(r) *Holland v. Clark*, 1 Y. & Coll. C. C. 151 (1842), moreover the letters were addressed to the husband of the party entitled (deceased) before he had taken out administration. Cf. *Grenfell v. Girdlestone*, 2 Y. & Coll. 676.

(s) 35 Ch. D. 607 (1887). Cf. *Wynne v. Stigan*, 2 Phill. 305 (1847), case where mortgagee also tenant for life; *Binns v. Nichols*, L. R. 2 Eq. 256 (1866), as to legacy, where legatee and executor the same person.

(t) 1 O. R. 170 (1882); affirmed, 9 A. R. 294 (1883). Cf. *Lyall v. Fluker*, 1873, W. N. 208, acknowledgment by insolvent after assignment.

*Locatees of the Crown—Effect of issue of patents to mortgagor or mortgagee*:—In *Watson v. Lindsay* (u), a locatee of the Crown mortgaged the land before the issue of the patents. The different effects of issuing the patents to the mortgagor's representative and to the mortgagee are shewn in the judgment of Osler, J.A.: "The plaintiff's counsel were obliged to admit that as between mortgagee and mortgagor the Statute of Limitations was running against the former before the patent was issued, so that if the full period has elapsed before the event happened, the plaintiff would have been without remedy. If indeed the patent had been issued to the plaintiff, the mortgagee, the possession of the mortgagor would have been of no avail to the latter, as he could not have been acquiring a title by possession against the Crown or the grantee of the Crown: *Jamieson v. Hacker*, 18 U. C. R. 590; *Dowsett v. Cox*, 18 U. C. R. 594; *Regina v. Wismer*, 6 U. C. R. 293; *Jackson v. Vail*, 7 Wend. 125; *Chiles v. Calk*, 4 Bitt. (Ky.) 534. The land, however, was granted to the person in possession, the representative of the mortgagor, in whose favour the statute was admittedly running. On what principle then can that avoid the statute?"

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising the same. Imp. Act 37-38 V. c. 57, s. 10.

24. No action, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable, out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. R. S. O. 1877, c. 108, s. 24.

*Enlargement by express trusts*:—The former law as to the effect of express trusts in relation to the Statute of Limitations will be found in *Lawton v. Ford* (t), in which it was contended that certain terms when created con-

(u) 6 A. R. 618 (1881).

(t) L. R. 2 Eq. 97 (1866).

tained express trusts; but that the express trusts being discharged, the terms remained not as trust terms but as mortgage terms, and therefore the saving as to an express trust did not apply. The Court however held that the statute could not reach the terms under the law as settled by the cases. The present section removed what was felt to be a great anomaly (*u*).

*Effect of trust for sale and payment of debts*:—Where a testator gave all his property to trustees "upon trust to sell and convert the same into money, and after payment thereof" of his just debts, etc., to divide the same, etc.; and also declared that his real estate was to be considered personalty from the time of his death, a claim was made for a debt more than six years old and less than twelve (the English period of limitation for realty) and the question arose what Statute of Limitations governed. Kay, J., said: "I can have no doubt whatever that by this will at least a charge, if not an express trust, is created for payment of debts out of the proceeds of the real estate and it is indifferent now, as I have said whether it is a charge or a trust, because under the recent Act the time of limitation is the same, viz.: [twelve] years, whether it be a charge or a trust. . . . There may remain another question upon which I will not give an opinion now. According to the series of cases which were considered in *Allan v. Gott (v)*, such a direction as there is here would make the debts payable rateably out of the real and personal estate. It is quite open to argument whether such part of the debt as is properly attributed to personal estate ought not to be considered to be barred (*w*).

(*u*) See *ib.* at p. 105. See also *Hughes v. Coles*, 27 Ch. D. 231 (1884); *Edwards v. Warden*, L.R. 9 Ch. 495 (1874); *Fearnside v. Flint*, 22 Ch. D. 379 (1883).

(*v*) L. R. 7 Ch. 439.

(*w*) *Re Stephens, Warburton v. Stephens*, 43 Ch. D. 39 (1889). See *Playfair v. Cooper*, 17 Beav. 187 (1853), as to legacies payable out of personalty.

The above case suggests a problem in connection with the Devolution of Estates Act, viz.; whether the extensive provisions of the 4th section of chapter 108 *supra* regarding the distribution of realty as personalty are to be given more effect than the declaration of the testator that "his real estate was to be considered as personalty from the time of his death." In other words will the real estate of a deceased person be still real estate within the provisions of chapter 111; or will it by virtue of chapter 108 be taken out of chapter 111 and treated as personalty in reckoning the period of limitations?

## DOWER.

Action of dower to be brought within ten years.

25. No action of dower shall be brought but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress or of any person claiming under her. R. S. O. 1877, c. 108, s. 25.

Time from which right to bring action of dower to be computed.

26. Where a dowress has, after the death of her husband, actual possession of the land for which she is dowable, either alone or with heirs or devisees of her husband, the period of ten years within which her action of dower is to be brought shall be computed from the time when such possession of the dowress ceased. This section shall not apply to any case in which the right of action has ceased before the fifth day of March, 1880. 43 V. c. 14, s. 3.

*Widow's right before section 26:—*In *McDonald v. McRae* (x), a case in which the right of action had ceased before 5th March, 1880, the widow had been in possession along with her infant daughters, but had taken no steps to have her dower assigned. Osler, J.A., said: "It was not attempted to impugn the decision in *McDonald v. McIntosh*. 8 U. C. R. 388, and similar cases, ending with *Laidlaw v. Jackes*, 27 Gr. 101, in which it has been held that the fact of the widow remaining in possession of her husband's land made no difference as to the necessity she was under of suing for her dower within the period of limitation after

(x) 13 A. R. 121, 127 (1886). See also *Allen v. Edinburgh Life*, 23 Gr. 306, 314.

his death. Having no title to any part of the land, her possession cannot be attributed to her right of dower."

*Agreement in lieu of dower may stop statute running*:—In *Fraserv. Gunn (y)*, there was a verbal agreement between the widow and the heir-at-law by which the widow was to receive one-third of the net rents in lieu of dower; and in pursuance of this arrangement a clause was inserted in a lease for ten years by which the lessee was to pay the widow one-third of the rent. Proudfoot, V.C., held that the agreement was binding and prevented the statute running.

*Possession of dowress may extinguish right of heirs*:—

"It seems anomalous that if the widow had been proceeded against by the heirs-at-law before their title was extinguished for an account of the rents and profits of the land received by her, she would have been entitled to retain one-third of the rents and profits as having been received by her *qua* dowress, and yet, during all the time during which these rents and profits were accruing, her possession of the land was ripening into a title under The Real Property Limitation Act on the ground that she was in possession not as dowress but as a wrongdoer. But The Real Property Limitation Act cannot be thus evaded, for the right of the heirs-at-law to bring an action against the widow to recover the said land accrued to them upon the death . . . and it would have been no answer by her to such action that she was entitled to such dower in the said land" (z).

*Pleading the statute in cases of dower*:—See *Banks v. Bellamy (a)*.

(y) 27 Gr. 63 (1879). See *Leach v. Shaw*, 8 Gr. 494. Cf. *Pyall v. McKee*, 3 O. R. 151 (1883).

(z) *Armour, J.*, in *Johnston v. Oliver*, 3 O. R. 43 (1883). See *Leach v. Dennis*, 21 U. C. R. 129.

(a) 27 Gr. 312 (1880). See *Begley v. St. Patrick's Literary Assoc.* 23 U. C. R. 395.



Where period of limitation elapsed against a tenant in tail to be deemed to have elapsed against those whose rights he could have barred.  
Imp. Act, 3-4 Wm. IV. c. 27, s. 21.

## BAR OF ESTATES TAIL.

27. Where the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same, has been barred by reason of the same not having been made or brought within the period limited by this Act, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred. R. S. O. 1877, c. 108, s. 26.

*Application of section 27:*—"We agree with the Court of Common Pleas, that the 21st section applies to the case where the right of entry of tenant in tail is barred by his neglect to make such entry in proper time, not to the case where he has conveyed away his own right to another, and put it out of his power to enter. In the latter case, the right of entry is not barred by reason of the same not being made within the period limited, but by reason of his not being able to enter against his own conveyance" (b). In other words, the distinction is, that in a case of "*voluntary abandonment*" by the tenant for life the issue may be barred by the lapse of a period that would not have barred them if the tenant for life had conveyed away his right (c).

*Does section 27 refer only to estates in remainder?*—See remarks of Lord Bramwell in *Earl of Abergrenny v. Brace* (d).

*Where remainderman under disabilities:*—If the statute has begun to run against a tenant in tail, it will continue to run against the remainderman, though he may be under disabilities (e).

(b) *Rimington v. Cannon*, 12 C. B. 34 (1853).

(c) *Ib.* at p. 16. See also *Austin v. Llewellyn*, 9 Exch. 276 (1853).

(d) L. R. 7 Ex. 149 (1872). "It would appear that sections 21 and 22 refer only to estates in remainder, the estate of the tenant in tail which descends to his issue being provided for already by section 2."

(e) *Goodall v. Skerrat*, 3 Drew. 216; 1 Jur. N. S. 57 (1855).

28. Where a tenant in tail of any land or rent entitled to recover the same has died before the expiration of the period limited by this Act, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action. R. S. O. 1877, c. 108, s. 27.

Term elapsed in such cases during the life of the tenant to be computed against those whose rights he could have barred. Imp. Act, 34 W. IV., c. 27, s. 22.

*Old law:*—For law under 21 Jac. I. c. 16, see *Taylor v. Horde* (f).

29. Where a tenant in tail of any land or rent has made an assurance thereof, which does not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person is by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which has taken effect after or in defeasance of the estate tail) continues or is in such possession or receipt for the period of ten years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as afore-said, then, at the expiration of such period of ten years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail. R. S. O. 1877, c. 108, s. 28.

In case of possession under an assurance by a tenant in tail, which does not bar the remainders, they shall be barred at the end of ten years after that period at which the assurance, if then executed, would have barred them. Imp. Acts, 34 W. IV., c. 27, s. 23; and 37-38 V. c. 57, s. 6.

*Object of section 29:*—"It was intended to legislate for the case of possession under a base fee. . . . The 'possession by virtue of such assurance,' to be effectual under the 23rd section, must be a possession by virtue of an assurance which turned an estate tail into a base fee"(g).

(f) 1 Burr. 60.  
(g) *Mills v. Capel*, L. R. 20 Eq. 692 (1875). See *Morgan v. Morgan*, L. R. 10 Eq. 99 (1870), following *Penny v. Allen*, 7 D. M. & G. 407. See *Re Shaver*, 3 Chy. Ch. 379 (1871).

## EQUITABLE CLAIMS.

In case of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser. Imp. Act, 3-4 W. IV. c. 27, s. 25.

30. (1) Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring an action against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. R. S. O. 1877, c. 108, s. 30.

Claim of *cestui que trust* against trustee.

(2) No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations. 44 V. c. 5, s. 17 (2).

*Rule in equity before 3-4 Wm. IV. c. 27*:—The Court of Chancery in applying the Statute of Limitations to cases of trusts, observed the distinction that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust* and no length of possession will bar (*h*); but if a party is to be constituted a trustee by the decree of a court of equity founded on fraud, or the like, his possession is adverse, and the Statute of Limitations will run from the time the circumstances of the fraud were discovered (*i*).

There is also the further distinction, that while in cases where there is no doubt of the origin and existence of a trust, the Court will not allow time to be a bar, yet in questions of doubt whether any trust exists, the Court will pay the utmost regard to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust (*j*).

(*h*) Cf. *Townshend v. Townshend*, 1 Br. C. C. 551; *Llewellyn v. Mackworth*, Barn. C. R. 449.

(*i*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633 (1806).

(*j*) *Atty.-Gen. v. Fish Mongers Co.*, 5 Myl. & Cr. 16 (1841).

*Rule under section 30*:—"The 25th section (*k*) of the late Statute of Limitations, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place, when the trustee sells to a third party for valuable consideration the property so held by him in trust" (*l*). This, it seems, is to be taken with the exception that the section cannot apply until the time when the party seeking the remedy himself becomes entitled to possession, as in the case of reversionary property (*m*).

*Trust must be express not constructive*:—In *Ferguson v. Ferguson* (*n*) the defendant obtained certain land on the agreement that he was to convey certain other lands to P. F. Instead of so conveying he sold the land. P. F. was of the age of twenty-one years. It was held that "the defendant was but constructive trustee of the land or of the money, and so the statute ran, and has barred the claim."

*What is and what is not a trust of legacies?*—In *Re Barker, Buxton v. Campbell* (*o*), a testatrix directed a conversion and that, "subject to the several trusts, provisions and directions hereinbefore contained, and to the payment of the several legacies hereby bequeathed," the

(*k*) Our section 30.

(*l*) Sugden, L.C., in *Law v. Bagwell*, 4 Dr. & War. 408 (1843).

(*m*) Sugden, L.C., in *Thompson v. Simpson*, 1 Dr. & War. 489 (1841); see *College of St. Mary Magdalen v. Atty.-Gen.*, 6 H. L. C. 215 (1857).

(*n*) 28 Gr. 381 (1881), *Blake, V.C.* Costs, however, were refused the defendant as he had denied the agreement. Cf. the dissenting judgment of Strong, J., in *McDonald v. McDonald*, 21 S. C. R. 201 (1892). See also *Banner v. Berridge*, 18 Ch. D. 254; *Petre v. Petre*, 1 Drew. 393; *Sands v. Thompson* 22 Ch. D. 614, trusts arising from acts of parties; *Dickinson v. Teesdale*, 1 D. J. & S. 59, trusts arising from operation of law; *Soar v. Ashwell* [1893] 4 R. 602, solicitor as trustee.

(*o*) [1892] 2 Ch. 495, following *Re Davis*, [1891] 3 Ch. 119. Cf. *Proud v. Proud*, 32 Beav. 234, *Francis v. Grover*, 5 Ha. 39, *Cunningham v. Foot*, 3 App. Cas. 974 (1878), question as to there being a trust for annuity. See also *Mutlow v. Bigg*, 18 Eq. 246, 1 Ch. D. 385; *Dawkins v. Penrhyn*, 4 App. Cas. 51, precatory trust; *Sturgis v. Morse*, 3 DeG. & J. 1, insolvent *cestui que trust* under will; *Thompson v. Eastwood*, 2 App. Cas. 215.

trustees should hold the property in trust for the residuary legatee absolutely. North, J., said: "There is a clearly marked distinction between that part of the property as to which a trust is declared, and that as to which no trust is declared. No trust is declared of the legacies. The estate, which is in the hands of the executors, is to be held by them upon certain trusts so far as trusts are declared; it is to be held subject to the payment of the legacies as to which no trust is declared, and then it is to be held on trust for the residuary legatee. In my opinion, this is not a trust legacy within the meaning of either the statute or the authorities."

*Express trust where only a portion of property specified in declaration of trust*:—See *Patrick v. Simpson* (p).

*Express trust in acting trustee*:—See *Life Association of Scotland v. Siddal* (q).

*Trust of surplus*:—See *Locking v. Parker* (r), *Re Bell, Lake v. Bell* (s).

*Mortgagee in possession, how far a trustee*:—A mortgagee in possession is not in a fiduciary relation in any such sense as to make him a trustee within section 30 (t).

*Mortgage by way of trust for sale*:—A mortgage taking the form of a trust for sale is treated as a mortgage and not as an express trust; so that section 19 applies (u).

(p) 24 Q. B. D. 128 (1889), trust held to include all estate, following *Salter v. Cavanagh*, 1 D. & W. 663, and distinguishing *Churcher v. Marten*, 42 Ch. D. 312, case where trust deed void under Mortmain Act. See *Yardly v. Holland*, 20 Eq. 428, trustees of will dealing with property as to which a partial intestacy; *Jacquet v. Jacquet*, 27 Beav. 332, charge or trust to pay debts.

(q) 3 D. F. & J. 58.

(r) L. R. 8 Ch. 30, explained in *Re Alison*, 11 Ch. D. 284.

(s) 34 Ch. D. 462 (1886), surplus after mortgage sale retained by solicitor.

(t) See *Hickman v. Upsall*, 4 Ch. D. 144 (1876), account of rents and profits.

(u) See *Re Alison*, *Johnson v. Mounsey*, 11 Ch. D. 284 (1879). See also *Sands to Thompson*, 22 Ch. D. 614.

*Persons in a fiduciary character; rule against adverse possession*:—"Possession is never considered adverse if it can be referred to a lawful title" (v).

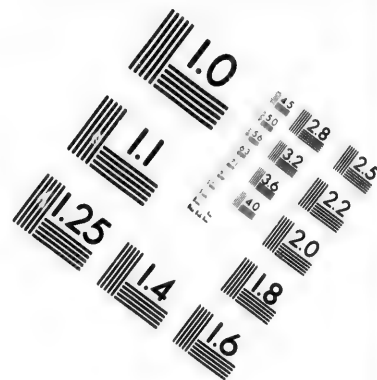
"This case of *Thomas v. Thomas* and the cases of *Stone v. Godfrey*, 5 De G. M. & G. 76; *Williams v. Pott*, L. R. 12 Eq. 149; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Wall v. Stanwick*, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; and *Lyell v. Kennedy*, 14 App. Cas. 437, establish the principle that if a person as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory), or in any other fiduciary character, enters into the possession of lands or into the receipt of the rents and profits thereof for and on behalf of the owner, the possession or receipt of such person is the possession and receipt of the owner and of those claiming under him; and the possession or receipt of such person, so long as he continues in such possession or receipt, is to be ascribed to the character under which he entered into such possession or receipt and he cannot denude or divest himself of such character except by going out of such possession or receipt and delivering up such possession or receipt to the owner or to those claiming under him" (w).

This is, of course, to be taken as applicable to persons in a fiduciary character. We have seen under the head of tenant at will (x) that much of the old distinction between *adverse* and non-*adverse* possession has been abolished; while tenants at will are expressly enabled to divest themselves of the character in which they assumed possession.

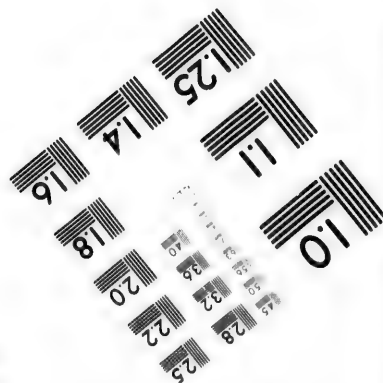
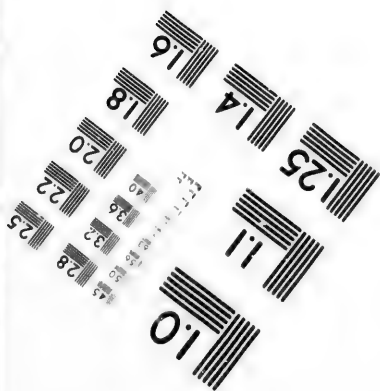
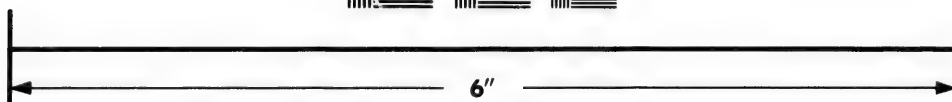
(v) *Page Wood, V.C.*, in *Thomas v. Thomas*, 2 K. & J. 79, followed in *Kent v. Kent*, 20 O. R. 462 (1891). See *Re Murray Canal*, 6 O. R. 685 (1884), husband's occupation taken to be as tenant by the curtesy so as not to operate tortiously against heirs of wife. See also *Tinker v. Rodwell* [1894] 8 R. Jan. 115, for explanation of *Thomas v. Thomas*, case of father in possession as bailiff for son.

(w) *Armour, C.J.*, in *Kent v. Kent*, 20 O. R. 463 (1891).

(x) Section 5 (7) *supra*.



A resolution test chart featuring various patterns of vertical and horizontal lines. Each pattern is accompanied by a numerical value indicating its resolution. The values include 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, 4.0, 4.5, 5.0, 5.6, 6.3, 7.1, 8.0, 9.0, 10, 11.2, 12.5, 14, 16, 18, 20, 22.5, 25, 28, 31.5, 36, 40, 45, 50, 56, 63, 71, 80, 90, 100, 112, 125, 140, 160, 180, 200, 224, 250, 280, 315, 360, 400, 450, 500, 560, 630, 710, 800, 900, 1000, 1120, 1250, 1400, 1600, 1800, 2000, 2240, 2500, 2800, 3150, 3600, 4000, 4500, 5000, 5600, 6300, 7100, 8000, 9000, 10000.

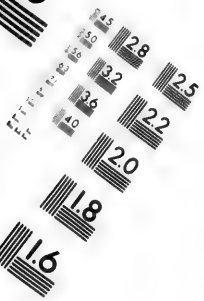


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We may now profitably examine some of the branches of inquiry into which the above general rules naturally lead.

*Bailiff, servant, agent or caretaker*:—There is some little difficulty and confusion in the case of those whom we may speak of, compendiously, as “caretakers”: the difficulty being to know whether to treat their occupancy as begun and continuing in a “fiduciary character,” which prevents the statute running; or as being in the nature of a tenancy at will which sets the statute running at the end of a year from the beginning of such occupancy.

The question is an old one and would appear always to have been answered or decided according to the circumstances of each case. Thus in an early Canadian case, Robinson, C.J., says:—“I wish to guard, however, against expressing the opinion that there may not be an occupation by another, on behalf of the owner, as servant or agent, and not for the benefit of the occupier, which will not come within the statute. There seems to be no ground for raising that question here.—3 Ad. & Ell. 66. 3 Bing. N. C. 498; 2 Sugd. 349” (*y*).

From this we may infer that the Chief Justice thought it essential to the establishment of an occupation as “caretaker” that the occupation should be on behalf of the owner and not for the benefit of the occupier; a requisite that would leave very little difficulty in the determination of the cases, in most of which the occupancy has certainly been to the benefit of the occupier. “Caretaker” within the scope of this decision would hardly include more than such as occupy the premises and turn over the fruits and profits to the owner.

In a subsequent case, however, the Chief Justice laid more stress on the owner's not intending to deprive himself of his power of dealing with the property. Thus he says:

(*y*) *Doe Perry v. Henderson*, 3 U. C. R. 500 (1847).

"Unless the jury ought clearly to have found that the defendant was in possession as servant or agent of his father, or had paid him rent within [twenty] years, or acknowledged his title in writing, we cannot say that they have given a wrong verdict.

"The evidence cannot be said to have established any of these points though in some respects it was strong to lead to the conclusion, that the defendant's father did not intend to divest himself of his legal estate in this property, or to deprive himself of his power of dealing with it, while he lived, and there is some reason for concluding that the defendant understood matters to be on that footing; but the rights of the parties to real estate, and with reference to the effect of the Statute of Limitations, are governed by certain legal principles and not by verbal or tacit understanding of parties"(z).

The fair inference therefore, is that the Chief Justice considered that an understanding that the rights of the owner to deal with the legal estate were to be preserved (though the occupancy should also be for the benefit of the the occupant) would be binding and sufficient to stop the currency of the statute; but that such understanding should not be merely a "verbal and tacit understanding."

Of such an understanding as would be sufficient in accordance with the view of the Chief Justice, we have an instance in *Greenshields v. Bradford* (a). The defendant B. squatted on the plaintiff's land, and on the plaintiff's agent discovering him, agreed to look after the property; the agent subsequently visited the property and got a written memorandum from B. agreeing to hold possession and look after the property for the plaintiff. This was held a sufficient recognition of the plaintiff's title; and, it was held that the defendants could not put him to the proof thereof.

(z) Robinson, C.J., in *Doe Quinsey v. Caniffe*, 5 U. C. R. 604 (1849).

(a) 28 Gr. 299 (1881).

*Parol evidence of occupation as caretaker:—*It seems, however, that an agreement to hold as caretaker may be proved by parol evidence. Thus in *Hickey v. Stover* (b), the defendant claimed possession through his mother as tenant and then sought to claim through her as caretaker. Boyd, C.—“The alleged answer to the Statute of Limitations by an averment that evidence can be given on a new trial that the mother was in possession as caretaker for the son, is evidently an after-thought. The son’s pleading is, that she was in as his tenant; in the character he now seeks to clothe her with, she would be in law his servant and not tenant: *Yates v. Charlton upon Medlock Union*, 48 L. T. N. S. 872.” Proudfoot, J.—“Under the Limitations of Actions Statutes (C. S. U. C. c. 88, s. 15); R. S. O. c. 108, s. 13 (c), an acknowledgment of title must be in writing. But evidence for the purpose of shewing that the occupant was in the position of caretaker or agent for the owner, may be given by parol: *Doe Quinsey v. Caniffe*, 5 U. C. R. 602; *Doe Perry v. Henderson*, 3 U. C. R. 486, 500; *Ryan v. Ryan*, 5 S. C. R. 387; *Johnson v. Oliver*, 3 O. R. 26, and had that defence been raised upon the pleadings, the evidence, if tendered, should have been admitted”(d).

*What constitutes occupancy as caretaker:—**Ryan v. Ryan* (e) is a case in which the diversity of opinion among the Judges illustrates the difficulty of distinguishing a tenancy at will and an occupancy as caretaker. The facts were such, however, that the plaintiff was found to be in no better case one way than another, for “whether originally caretaker, or trespasser, or tenant at will, he was

(b) 11 O. R. 106 (1885), followed in *Clark v. McDonnell*, 20 O. R. 564 (Jan. 1891), but disapproved in *Kent v. Kent*, 20 O. R. 463, 473 (Feb. 1891), not on this point, however.

(c) Now c. 111, s. 13.

(d) Application for new trial refused.

(e) 5 S. C. R. 387 (1881).

tenant at will from the time of the last agreement" (f); said last agreement being an arrangement made within ten years. There are, however, in this case some very instructive dicta on the subject of what constitutes a caretaker. Thus Ritchie, C.J., says:—"The (plaintiff), in my opinion, was not in the full possession of his lot nor occupying it as his own. On the contrary, I think that his possession was the possession of the father; he held it subject to the control of his father, and under him, as his agent or caretaker; that as his father's agent, and for his father's benefit, he kept off trespassers, that by the direction and under the authority of his father he sold timber off it to pay the taxes; that the timber he took was, by agreement with his father, confined to timber for his own use only, and was taken under the authority and by the permission of his father; and when the father heard he was cutting more than he ought, P., the other son, was sent by the father to stop him and others, which he did; all of which doings in connection with the property he continuously, from time to time, if not every year, reported to his father and received from him, as owner, directions respecting the management of the property" (g).

*Distinction between caretaker and tenant at will*:—"It was argued that the plaintiff's father was in possession as a mere caretaker or servant of the plaintiff, in which case time does not run against the true owner; but I am of opinion that this is not the correct result of the evidence. I concede that where it is shewn that a contract of hiring exists between the parties, and the possession has been incidental to that contract, the statute does not operate. But where, as in the present case, no such relationship existed between the parties, and the party in possession

(f) The last agreement was one made between the plaintiff and the agent sent up by his father, the owner, to remove him from possession. Even as to the latter agreement there was doubt as to whether it created a new tenancy-at-will or continued a caretakership. See judgment of Gwynne, J.

(g) At p. 402.

has been let in upon the terms of performing certain services upon the land, taking in recompense the profits of the land,<sup>1</sup> a tenancy at will is created "(h).

*How occupant may divest himself of caretakership:—* A nice point arose in *Heward v. O'Donohoe* (i), where the defendant was caretaker for one of several co-owners, and the property was severed by judicial decree. It was argued that the severance of the ownership altered the relation between the defendant and the owners. But it was held by the Supreme Court that no act being done by the defendant declaring that he would not continue to act as caretaker, his possession, therefore, continued to be that of caretaker and he acquired no title by possession.

*Occupation by wrong, will not be construed into caretakership:—* "As to the ground upon which it has been attempted to rest the case, namely, that the defendant might be looked upon by the jury as holding as bailiff or servant of the lunatic, J. S., we could not sanction the case being so distorted; for it is clear on the evidence, that the defendant entered as a purchaser claiming the fee, and not more in the character of an agent or servant than any trespasser who might have entered at that time. It may be a hard case, in this respect, that the defendant may thus have acquired a valuable estate for a very inadequate price, to the prejudice of the heir; but the facts were all known and his conduct cannot be more illegal than it would have been if he had entered . . . by violence and driven the family off, having himself no pretence of right whatever, in which case the remedy of the heir would after this lapse of time be barred" (j).

(h) *Strong, V.C.*, in *Truesdell v. Cook*, 18 Gr. 535 (1871); Cf. *Fraser v. Fraser*, 17 U. C. C. P. 76 (1864); *Doe Kingsbury v. Stewart*, 5 U. C. R. 108 (1848); *Doe Quinsey v. Caniffe*, 5 U. C. R. 602 (1849); *Doe Smyth v. Leavens*, 3 U. C. R. 411 (1847); *Doe Ausman v. Minthorne*, *Id.* 423; *Doe Murney v. Mathews*, *Id.* 461.

(i) 19 S. C. R. 341 (1891), following *Ryan v. Ryan*, *supra*.

(j) *Doe Silverthorne v. Teal*, 7 U. C. R. 372 (1859), *Robinson, C.J.*

*Summary*.—On the whole we may conclude that whether a man is caretaker, tenant at will or trespasser, is largely a question of the degree of control exercised by the owner and submitted to by the occupant; that a caretakership when once established, is something entirely distinct from a tenancy (at will or otherwise) and is not subject to the Statute (*k*); that the rules as to proof of an acknowledgment under the Statute do not apply to the proof of an agreement to occupy as caretaker, which may be shown by parol evidence (*l*); that a caretakership must be proved as a fact and will not be inferred merely to further the interests of Justice; that a caretakership, when once established cannot be changed into another form of occupancy except either by a new arrangement with or disposition by the owner; or by the occupant doing some act to shew his intention of not continuing to hold as caretaker.

It may be as well to remember that a person claiming under the Statute, may have held his possession through a caretaker instead of himself occupying the premises (*m*).

*Adverse possession by a beneficiary*.—There is nothing in the present section to prevent one *cestui que trust* from setting up the statute against another, where on his own account he has been in possession for a sufficient time. Thus in the important case of *Burroughs v. McCreight* (*n*), lands were conveyed to a trustee and his heirs, in trust for five persons, as tenants in fee. For more than twenty years prior to the filing of the bill four of the tenants in common had been, by their agent, in the uninterrupted and exclusive receipt and enjoyment of the rents and profits of all the lands. The trustee never in any manner interfered in the

(*k*) See also *Ellis v. Crawford*, 5 Ir. C. R. 402, cited in *Greenshields v. Bradford*, 28 Gr. 301 (1881).

(*l*) See the judgment of Gwynne, J., in *Ryan v. Ryan*, cited *supra*.

(*m*) See *Heyland v. Scott*, cited under sections 5 (7) *supra*.

(*n*) 1 Jones & Lat. 290 (1845), Lord St. Leonards.



trust. It was held that the title of the fifth tenant in common was barred by the 3 & 4 Wm. IV. c. 27, and that the case was not within the saving of the 25th section (o).

Similarly in the recent case of *Murchison v. Murchison* (p), we find Street, J., saying:—"There is nothing in the facts to lead to the conclusion that R. D. M. took possession on the 12th March, 1880, under the trustees, but everything to lead to a contrary conclusion. He received the rents himself, and applied them to his own use, treating himself throughout as absolute owner; and by his will he purported to deal with the property as his own, by devising it to his wife and children. His possession is charged by the plaintiffs in their pleadings to have been a wrongful possession from the beginning. It is true that he was one of the beneficiaries under the marriage settlement, and as such was entitled to receive from the trustees a part of the rents, but this did not entitle him to the possession of the land, the right to which was vested by the marriage settlement in the trustees. I think that the case is governed by the principles laid down by Lord St. Leonards in *Burroughs v. McCreight*, 1 J. & L. 290. R. D. M. did not place himself in the shoes of the trustees when he took possession on 12th March, 1870, but took possession adversely to them, and continued to hold adversely to them until his death."

*Adverse possession by executor*:—*Johnson v. Krammer* (q), was a rather curious case in which the person designated to carry out a trust when it should arise, gained title by possession, the express trust never having arisen. The gist of the case is well expressed by Osler, J.A.:—"I think the proper construction to be placed on this will is,

(o) *i. e.* the present 30th.

(p) 17 O. R. 254 (1889). See further, *Keene v. Deardon*, 8 East, 248; *Smith v. King*, 16 East, 283; *Drummond v. Sant*, L. R. 6 Q. B. 763; *Gerrard v. Tuck*, 8 C. B. 231.

(q) *Johnson v. Krammer*, 8 O. R. 193 (1884).

that a life estate was given to the testator's widow, with a power of sale to the executors during her life-time with her consent, and the remainder in fee to the children on her death in the event of the non-execution of the power. Unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the land, and he did not take nor was it necessary that he should take the legal estate, as he never was required to execute the power, it seems to me that he never became trustee, and that the plaintiff's title is barred by the Statute."

*The executor of a deceased trustee cannot set up statute:—See Brittlebank v. Goodwin (r).*

*Purchase by trustee, mortgagee, etc., not within statute:—*"That the Statute of Limitations has no application to the case of a trustee or other fiduciary agent purchasing in fraud of the rights of his *cestui que trust* or principal is well established by authority. A suit in equity for this purpose has been held not to be, as it is apparent it is not, a suit for the recovery of land, but is considered one to be relieved against a breach of trust or a constructive equitable fraud and to have the purchaser, who, by these means, has obtained the legal estate, declared a trustee of it for the plaintiff. It does not, therefore, come within the 24th section of the 3 & 4 Wm. IV. c. 27 (s) . . . but is left as before the statute to be dealt with by Courts of Equity upon the principle of acquiescence or laches" (t).

*The Crown not barred although a trustee:—*"I think I am bound by *Regina v. Williams*, 39 U. C. R. 397,

(r) L. R. 5 Eq. 545 (1868), *Dunne v. Doran*, 13 Ir. Eq. R. 545, and *Brereton v. Hutchinson*, 3 Ir. Ch. R. 361, not followed.

(s) Re-enacted by R. S. O. 1877, c. 108, s. 29; now incorporated in section 4 of the present Act.

(t) *Faulds v. Harper*, 11 S. C. R. 650 (1886), *Strong, J.*

expressly deciding that the Crown is not barred though a trustee" (u).

*Operation of section 30 on charities*:—Charities are trusts, and are within the provisions of 3-4 Wm. IV. c. 27 (v); and where the Attorney-General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred (w).

*Notice of an express trust in favour of charity*:—The lapse of the statutory period after a conveyance for a valuable consideration is made equally a bar, whether the purchaser takes with or without notice of the trust (x). The former rule was that length of time would not prevail against charitable trusts where the land had been purchased with notice of the trusts (y).

*A lease may be sufficient alienation*:—"Here the alienation was a lease, but what difference can that possibly make? A lease is an alienation *pro tanto*. It might have been a lease for 999 years at a peppercorn rent, which would amount to an absolute alienation" (z).

*For rights of stranger as against trustee and beneficiary*:—See *Scott v. Scott* (a).

(u) *Boyd, C.*, in *Attorney-General v. Midland R. W. Co.*, 3 O. R. 521 (1882); *President of St. Mary Magdalen v. The Attorney-General*, 18 Beav. 224, 6 H. L. 189; *Regina v. Bayley*, 1 Dr. & War. 213, and *Regina v. Guinness*, 3 Ir. Ch. R. 211, considered.

(v) Cf. *Magdalen v. Knotts*, 4 App. Cas. 324 (1879). See *Atty.-Gen. v. Perse*, 2 Dr. & War. 67; *Commissioners of Charitable Donations v. Wybrants*, 2 J. & Lat. 182.

(w) *Magdalen College v. Atty.-Gen.*, 6 H. L. C. 189 (1857).

(x) *Ib.* at p. 216. Cf. *Atty.-Gen. v. Flint*, 4 R. 147 (1894); *Atty.-Gen. v. Davis*, 18 W. R. 1132.

(y) See e.g. *Atty.-Gen. v. Christ's Hospital*, 3 M. & K. 344 (1834).

(z) *Atty.-Gen. v. Payne*, 27 Beav. 173 (1859). Cf. *Atty.-Gen. v. Davey*, 4 DeG. & J. 136.

(a) 4 H. L. C. 1065 (1864). Cf. *Young v. Harris*, 65 L. T. 45, infant *cestui que trust*, and see *Hewitt on Limitations*, p. 192.

*Liability of trustee:*—We may here insert a portion of 54 V. c. 19 (O).

An Act respecting certain Duties, Powers and Liabilities of Trustees.

1. This Act may be cited as "The Trustee Act, 1891. Short title.

2. (1) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds. Interpretation.

(2) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

(3) The expression "stock" shall include fully paid up shares.

(4) The expression "instrument" shall include an Act of the Legislature of Ontario.

13. (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:— Actions against trustees.

(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent, as if the claim had been against him in an action of debt for money had and received; but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether

with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment, or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding, and this section had been pleaded.

Application of section.

(3) This section shall apply only to actions or other proceedings commenced after the first day of January, 1892, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

Application of Act.

14. (1) This Act shall apply as well to trusts created by an instrument executed before as to trusts created after the passing of this Act.

Proviso.

(2) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

54 V. c. 19, s. 13:—See *Moore v. Knight* (b), *re Page*, *Jones v. Morgan* (c), *re Bowden*, *Andrew v. Cooper* (d).

*Exceptions to 54 V. c. 19*:—"I turn to the exceptions to see whether this particular claim by the plaintiff is or is not excepted. It is not a claim '*founded upon any fraud or fraudulent breach of trust*.' It is not '*to recover trust property or the proceeds thereof still retained by the trustee*,' nor is it in my judgment to recover trust property or the proceeds of trust property, '*previously received by the trustee and converted to his use*'" (e).

*Investments by solicitor, liability for*:—A solicitor in advancing money on mortgage may be employed (1) to

(b) [1891], 1 Ch. 547, discussing *Blair v. Bromley*, 2 Ph. 354, 5 Ha. 542.

(c) [1892], 1 Ch. 304, trustee expending money in educating infant.

(d) 45 Ch. D. 444 (1890), following assets; pleading 54 V. c. 19, s. 13 (b).

(e) *Re Gurney*, *Mason v. Mercier* [1893], 1 Ch. 593, *per* Romer, J.

invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against a solicitor the Statute of Limitations is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and *cestui que trust* then existing between them (*f*).

*Shall run against a married woman:—See Lowe v. Fox (g).*

31. In every case of a concealed fraud, the right of any person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been first known or discovered. R. S. O. 1877, c. 108, s. 31.

In cases of fraud no time shall run whilst the fraud remains concealed. Imp. Act, 3-4 Wm. IV. c. 27, s. 26.

*What must shewn under section 31:—*"To bring a case within that section these circumstances must concur:—(i) there must have been a fraud; (ii) that fraud must have deprived the plaintiff or his predecessors in title of the estate; (iii) such fraud must have been concealed; (iv) the concealment must have been such that it could not, with reasonable diligence, have been discovered sooner than it was in fact discovered, and, of course, must have been within [twelve] years before the commencement of the action" (*h*).

*What constitutes fraud within this section?—*"it is not any and every fraud which will elide the provisions of the statute and keep alive a right of action for recovery of the lands. In order to constitute a fraud which will have that effect, these statutory requirements must be fulfilled.

(*f*) *Dooby v. Watson*, 39 Ch. D. 178 (1888), *Mare v. Lewis*, 1 R. 4 Eq. 219, observed upon. See further *Scar v. Ashvell* [1893], 4 R. 602.

(*g*) 15 Q. B. D. 667 (1885).

(*h*) *Kay, L.J.*, in *Willis v. Howe*, [1893] 2 R. 431, following *Lawrence v. Norreys*, *infra*. As to pleading, see *Riddell v. Strathmore*, 3 Times, Rep. 329; *Vane v. Vane*, 8 Ch. 395; *Bosby v. Holder*, 54 L. T. 298.

In the first place, it must be a fraud which has deprived the plaintiff of his land ; and in the second place it must be a concealed fraud, in this sense, that it was not only unknown to the plaintiff and to those through whom he derives right, but could not, with reasonable diligence, have been discovered by him or them before the commencement of the [twelve] years immediately preceding the institution of his suit" (i).

*What is concealed fraud?* — "Vice-Chancellor Kindersley, in *Petre v. Petre* (j), says : 'What is meant by concealed fraud? It does not mean the case of a person entering wrongfully into possession : it means a case of designed fraud by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment, enables himself to enter and hold.' That is not an exhaustive definition, and perhaps none could easily be given of the meaning of 'concealed fraud.' It is not merely an 'unknown fraud,' but the word 'concealed' seems to indicate that there are facts known to the person who enters, and designedly concealed by him from the real owner which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is not only the knowledge but the concealment of those facts. If they had been disclosed, and the person who disclosed them had nevertheless entered, the entry would have been wrongful, but would it have been fraudulent? The section seems to point to some contrivance by which the real owner has not merely been deprived, but defrauded, in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter" (k).

(i) Lord Watson in *Lawrence v. Norreys*, 15 App. Cas. 220 (1890).

(j) 1 Drew, 371, 397 ; 1 W. R. 139. Cf. *Dean v. Thwaite*, 21 Beav. 621.

(k) Kay, L.J., in *Willis v. Howe*, [1893], 4 R. 432.



*Proof of concealed fraud*:—In *Rains v. Buxton* (l), an underground cellar occupied by B. under the land of A. was held no evidence of concealed fraud.

For instances of what have or have not been considered fraud within this section, see *Sturgis v. Morse* (m), *Price v. Beverington* (n), *Lawrence v. Norreys* (o), *Vane v. Vane* (p).

"*Due diligence*":—*Chetham v. Hoare* (q) was an extraordinary case in which it was sought to shew that through the mutilation of a marriage registrar a marriage taking place in 1724 was not discovered until 1868; and that such marriage was an important link in the plaintiff's chain of title. Notwithstanding the lapse of time the Court seriously discussed the case, and Malins, V.C., said: "The proposition that a bill can be maintained to recover possession of land, the title to which accrued more than a century before it is filed, is I must say a very alarming one, and tends to shake the security of property in this country, if entertained by this Court, to a very alarming extent. But there is no doubt if the plaintiff brings himself within the protection of the law, however great the length of time may be, he is entitled to recover upon the strength of that title which the law has conferred upon him." In the case in question, however, the learned Vice-Chancellor decided that by due diligence the marriage could have been discovered long before, a certificate or register not being the sole sufficient proof of such event.

(l) 14 Ch. D. 537 (1880). See *Beavan v. London Portland Cement Co.*, [1893], 3 R. 47, tunnel; *Dartmouth v. Spittle*, 19 W. R. 444, coal mine; *Dawkins v. Penrhyn*, 6 Ch. D. 324, mere ignorance; *Ex p. Breach*, 12 W. R. 769, setting up fraud on a petition.

(m) 24 Beav. 541 (1857), 3 De G. & J. 1, insolvent omitting property from schedule.

(n) 3 Mac. & G. 486 (1857), conveyance by lunatic; cf. *Manby v. Bewicke*, 3 Kay & J. 342; *Lewis v. Thomas*, 3 Ha. 26.

(o) 39 Ch. D. 224 (1888), also 15 App. Cas. 213, conspiracy with solicitor to destroy deed.

(p) L. R. 8 Ch. 383 (1872), concealment of heirship from true heir.

(q) L. R. 9 Eq. 571 (1870). Cf. *Vane v. Vane*, L. R. 8 Ch. 390n (1872); *Willis v. Howe*, *supra*.

*Fraudulent deed remains fraudulent* :—"It is objected that the plaintiff cannot succeed because the Statute of Limitations has rendered the deed of 1873 under which possession was taken indefeasible by creditors. For that no authority was cited, since *Re Madden*, 27 Ch. D. 527, does not go in that direction. The expression of Baggallay, L.J., 'I do not see how the right can be lost by mere delay to enforce it unless the delay is such as to cause a statutory bar,' refers to such delay on the part of the plaintiff as would bar his right to a judgment for the debt. It does not imply that a deed which is by the statute fraudulent as to creditors is validated because it may not be attacked for ten or twenty years. If it is a fraudulent deed it remains so to the end of time, though it might not be effectively impeachable because of purchasers for value without notice having intervened or because the claims of all creditors have been barred, or extinguished by lapse of years" (r).

Unless in the case of *bona fide* purchaser for value without notice.  
Imp. Act, 3-4 Wm. IV. c. 27, s. 26.

32. Nothing in the last preceding section contained shall enable any owner of lands or rents to bring an action for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed. R. S. O. 1877, c. 108, s. 32.

*"Did not know and had no reason to believe"* :—The legislature meant "did not know and had not reason to believe, either by himself or some agent whose knowledge or reason to believe is by settled law deemed and taken to be his" (s).

Right to refuse relief on the ground of acquiescence or otherwise.  
Imp. Act, 3-4 W. IV., c. 27, s. 27.

33. Nothing in this Act contained shall be deemed to interfere with any rule of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act. R. S. O. 1877, c. 108, s. 33.

(r) *Boyd, C.*, in *Boyer v. Gaffield*, 11 O. R. 573 (1886).

(s) *See Vane v. Vane*, L. R. 8 Ch. 400 (1873).

*Acquiescence* :—" Now, in order to constitute equitable acquiescence it is incumbent on the party who relies on it to prove, not merely that there was some vague suspicion of wrong, but that actual knowledge of the facts was brought home to the party to be affected by it. It is said by a text writer (t) :—' Acquiescence also imputes knowledge, or the means of knowledge, of the material facts alleged to have been acquiesced in, for a person cannot be said to have acquiesced in what he did not know, and as to the claims which he did not know he could dispute.' And this I adopt as a fair statement of the principles settled by the numerous cases which are referred to as authorities, particularly the *Marquis of Clanricarde v. Henning* (u), and *Charter v. Trevelyan* (v). In the last well-known case the whole principle upon which courts of equity give effect to lapse of time as a defence is succinctly stated by Lord Cottenham, and his judgment has always been considered as remarkable, as well for a correct exposition of the law as for the felicity of the language in which it is expressed. In *Randall v. Errington* (w), Sir William Grant states the principle very distinctly as follows :—' To fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers ' ' (x).

*For signification of acquiescence* :—See *Bussche v. Alt* (y); *Duke of Leeds v. Amherst* (z).

(t) Browne, on Limitations, p. 516.

(u) 30 Beav. 175 (1861).

(v) 4 L. J. N. S., Ch. 209, 8 Jur. 1015 (1844). Cf. *Life Assocn. v. Siddal*, 3 D. F. & J. 72, 74; *Marker v. Marker*, 9 Ha. 16; *Pickering v. Stamford*, 2 Ves. Jun. 280; *Newton v. Ayscough*, 19 Ves. 539.

(w) 10 Ves. 428 (1805), purchase of trust property by trustee. Cf. *Morse v. Royal*, 12 Ves. 235; *Walker v. Symonds*, 3 Swanst. 64.

(x) Strong, J., in *Faulds v. Harper*, 11 S. C. R. 652 (1886). See also *Aikins v. Delmage*, 12 Ir. Eq. Rep. 14, also cited in same case.

(y) 8 Ch. D. 314 (1878), acquiescence before and after the fact.

(z) 2 Ph. 123 (1846), proper meaning of acquiescence is not that intended by the statute.

*Receipt by cestui que trust of part of what he is entitled to*:—"We consider it to be a well established rule that a *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain, unless there is something in the surrounding circumstances from which an intention so to do can be clearly inferred" (a).

*Distinction between laches and acquiescence*:—"So far as laches is a defence, I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute (b). But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar" (c).

*Laches*:—"I consider it to be clear that in cases not within the statute the Courts will now, as Courts of Equity formerly did, act in analogy to the statute, and give effect to that analogy by holding the lapse of a period of time equal to that which would have been a bar if the case had been within the statute fatal to a claim based upon an

(a) *Re Cross*, *Harston v. Tenison*, 20 Ch. D. 122 (1882).

(b) Cf. *Re Baker*, *Collins v. Rhodes*, 20 Ch. D. 230 (1881); *Three Towns Co. v. Maddever*, 27 Ch. D. 523 (1884); *Fullwood v. Fullwood*, 9 Ch. D. 176 (1878). Cases of legal rights where the period had not lapsed.

(c) *Archbold v. Scully*, 9 H. L. C. 383 (1861). As to periods of acquiescence, see *Hicks v. Cooke*, 4 Dow. 17, fifty years; *Gray v. Chaplin*, 2 Russ. 126, forty-seven years; *Portlock v. Gardner*, 11 L. J. Ch. 313, twenty-three years; *Blake v. Gale*, 32 Ch. D. 571, *Tucker v. Sanger*, *McClell.* 424, twenty years; *Swanton v. Raven*, 3 Atk. 105, fifteen years.

equitable title. And this, too, in cases where there has been only laches in the sense of an abstinence from suing with a mere knowledge of the right without further acquiescence. *Hovenden v. Lord Annesley* (d), and *Beckford v. Wade* (e), are old and well known authorities on this head" (f).

*Circumstances to be looked at in considering laches:—*

"Two circumstances always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, as far as relates to the remedy" (g).

PRESCRIPTION IN CASES OF EASEMENTS.

34. No claim which may be lawfully made at the Common Law, by custom, prescription or grant, to any profit or benefit to be taken or enjoyed from or upon any land of our Sovereign Lady the Queen, her heirs or successors, or of any ecclesiastical or lay person or body corporate, except such matters or things as are hereinafter specially provided for, and except rent and services, shall, where such profit or benefit has been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such profit or benefit has been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. R. S. O. 1877, c. 108, s. 34.

Certain claims not to be defeated by shewing only that the same enjoyed for less than 30 years. Imp. Act, 23 Wm. IV. c. 71, s. 1.

Indefeasible if enjoyed over 60 years.

(d) 2 Sch. & Lef. 617.

(e) 17 Ves. 97.

(f) From the dissenting judgment of Strong, J., in *McDonald v. McDonald*, 21 S. C. R. 213 (1892); citing also *Lord Clanricarde v. Henning*, 30 Beav. 175, fifty-two years from sale and thirty years from death of vendor; *Hodgson v. Bibby*, 32 Beav. 221, twenty-eight years lapse; *Bright v. Legerton*, 29 Beav. 60, twenty years; *Lewin on Trusts*, 9th Ed. p. 1055. See further *Pattison v. Hawkesworth*, 10 Beav. 375, twenty-eight years.

(g) *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 240 (1874), see *Allgard v. Skinner*, 36 Ch. D. 163.

Right of way, or water not to be defeated by shewing only that it began more than 20 years ago. Imp. Act 2-3 Wm. IV. c. 71, s. 2.

Indefeasible if enjoyed over 40 years.

35. No claim which may lawfully be made at the Common Law by custom, prescription or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of our said Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated, and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. R. S. O. 1877, c. 108, s. 35.

*Title by prescription distinguished from bar under Statute of Limitations:*—"No right or title could be acquired by user and enjoyment for a period less than forty years, and these forty years from the commencement of the user and enjoyment had not expired before this action. . . . The defendants relied upon the cases *Norton v. The London & North Western R. W. Co.*, 13 Ch. D. 268; *Bobbett v. The South Eastern R. W. Co.*, 9 Q. B. D. 424, and *The Erie & Niagara R. W. Co. v. Rosseau*, 17 A. R. 483. These cases are, however, I think clearly distinguishable. They are cases decided under the provisions of the Statute of Limitations: 'No person shall make any entry or distress, or bring any action to recover any land or rent,' etc., etc., and not under the Act known as The Prescription Act, which was originally passed as an Act for shortening the times or periods of prescription in certain cases: see *Gale on Easements*, 5th Ed. p. 165 *et seq.*, and R. S. O. c. 111, s. 35, under the latter of which this branch of the present case falls" (*h*).

(*h*) *Ferguson, J.*, in *Canada Southern R. W. Co. v. Niagara Falls*, 22 O. R. 54 (1892), following *Canada Southern R. W. Co. v. Lewis*, 20 C. L. J. N. S. p. 241.

In *Mykel v. Doyle (i)*, Hagarty, C.J., after pointing out the inconveniences that would result from subjecting easements to the Limitation Act, says: "I content myself with holding that the Ontario Act, shortening the period of limitation to ten years, does not apply to the defendant's interruption of the plaintiff's right to a way *in alieno solo* for this shortened period."

*How an easement may be extinguished under the Limitation Act*:—"I agree that a way over Blackacre, as an easement enjoyed with and appurtenant to the possession of Whiteacre, will be barred by whatever bars the right to the possession and ownership of Whiteacre; and this can, of course, be barred by the ten years' limitation; in other words, that the way so appurtenant cannot be held or used apart from the possession of Whiteacre. This would be a case in which the right to 'land' might cover and include 'incorporeal hereditaments' in the words of our Prescription Acts" (*j*).

"*By custom*":—"It is needless to discuss the difficulties parties must be under in attempting to establish a custom in Ontario" (*k*). "Here there is no time immemorial on which to found it" (*l*).

*Nature of claim by prescription in general*:—"No one can claim a prescription in his own land" (*m*).

There is a difference between the prescriptive right to land and to take something from the land (*n*).

<sup>(i)</sup> U. C. R. 69 (1880), followed in *McKay v. Bruce*, 20 O. R. 709 (1891).

<sup>(j)</sup> Hagarty, C.J., *ib.* p. 68.

<sup>(k)</sup> *Grand Hotel Co. v. Cross*, 44 U. C. R. 171 (1879), Hagarty, C.J.

<sup>(l)</sup> *Id.* 163, *per* Armour, J.

<sup>(m)</sup> *Cooper v. Barber*, 3 Taunt. 99 (1810), case of penning water on one's own land.

<sup>(n)</sup> See *Wilkinson v. Proud*, 11 M. & W. 33 (1843), right to whole seam of coal. See *Atty.-Gen. v. Matthias*, 4 K. & J. 579.



There can be no prescriptive right, in the nature of a servitude or easement, so large as to preclude the ordinary uses of property by the owners of the land affected; and where a claim of such nature is incapable of judicial restriction and control, it cannot be sustained by prescription (*o*).

Rights sustainable by grant are not necessarily sustainable by prescription (*p*), but those sustainable by prescription must be capable of being granted (*q*).

*Distinction between sections 34 and 35*:—The Act “clearly distinguishes between easements and common or profit *a prendre*; and a different limitation is established for the first and latter cases” (*r*).

*Distinction between common or profit and easement*:—A profit *a prendre* “must be something taken out of the soil.” Thus the right of washing and watering cattle is not a profit *a prendre*, but a mere easement (*s*).

“An easement is a privilege *without profit*, which the owner of one tenement has the right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former” (*t*).

(*o*) Dyce v. Hay, 1 Macq. 305.

(*p*) *Ib*.

(*q*) Staffordshire Co. v. Birmingham Co., L. R. 1 H. L. 278.

(*r*) Bailey v. Appleyard, 8 Ad. & Ell. 161 (1838).

(*s*) Manning v. Wardle, 5 A. & E. 758 (1836). Cf. Jones v. Richard, 5 A. & E. 413; Blewitt v. Tregonning, 3 Ad. & Ell. 554; Hanmer v. Chance, 4 D. J. & S. 626.

(*t*) Goddard on Easements, Amer. Ed. 2. Cf. Buzzard v. Capel, 8 B. & C. 145, without profit; Ackroyd v. Smith, 10 C. B. 164; Rangeley v. Midland R. Co., L. R. 3 Ch. 310, there must be both servient and dominant tenements; Hewlins v. Shippam, 5 B. & C. 221, easements incorporeal rights; Holmes v. Going, 2 Bing. 83, Roe v. Siddons, 22 Q. B. D. 236, the two tenements must belong to different owners; James v. Plant, 4 Ad. & Ell. 761, effect of uniting ownership in one person.

*A novel easement cannot be annexed to property*:—"A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of the property" (*u*).

*Instances of profits a prendre*:—The right to cut and carry away litter (*v*); right to enter a close and cut down and carry away trees (*w*); right to take gravel and sand from seashore (*x*).

"The property in animals, *ferre nature*, while they are on the soil, belongs to the owner of the soil and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling and so forth; that right may be granted by the owner of the fee simple, and such a grant is a license of a *profit a prendre*" (*y*).

*Period of enjoyment of right of common or profit a prendre*:—"If the claim had been made by virtue of immemorial user, or of a non-existing grant, as was done before the statute, twenty-eight years' enjoyment would have been some evidence; but the late Act, while it dispenses with the necessity of setting up such user or grant and limits proof to a thirty years' enjoyment, requires that that enjoyment shall be proved to the full extent" (*z*).

"The period mentioned in the Act is plainly thirty years next before some suit or action in which the claim shall be brought into question" (*a*).

(*u*) *Hill v. Tupper*, 2 H. & C. 127 (1863).

(*v*) *Earl De la Warr v. Miles*, 17 Ch. D. 535 (1881).

(*w*) *Bailey v. Stephens*, 12 C. B. N. S. 91 (1862).

(*x*) *Constable v. Nicholson*, 14 C. B. N. S. 230 (1863).

(*y*) *Ewart v. Graham*, 7 H. L. C. 344 (1859). Cf. *Devonshire v. O'Connor*, 24 Q. B. D. 476 (1890); *Davies' Case*, 3 Mod. 246; *Wickham v. Hawker*, 7 M. & W. 78 (1840). As to fishing, see *Hardres*, 407.

(*z*) *Littledale, J.*, in *Bailey v. Appleyard*, 8 Ad. & Ell. 164 and 168 (n) (1833), explained in *Hollins v. Verney*, 13 Q. B. D. 311 (1884), see also *Flight v. Thomas*, 11 A. & E. 688; 8 Cl. & F. 231.

(*a*) *Richards v. Fry*, 7 Ad. & Ell. 706 (1838), following *Wright v. Williams*, 1 M. & W. 77.

*Proof of enjoyment of profit a prendre*:—"It seems to me that in order to maintain a defence under the Prescription Act, those who set it up must first shew, if they set up a prescription for sixty years, that they have taken or enjoyed for sixty years, a certain right, or profit, or benefit. Right in that sense means something a right to do which is claimed. . . . The next fact which anyone who relies upon the Act has to prove is that that right, profit, or benefit which he has so taken or enjoyed for sixty years, he has enjoyed as of right. The true interpretation of those words, 'as of right' (b) seems to me to be that he has done so upon a claim to do it, as having a right to do it without . . . permission, and that he has done so without . . . permission" (c).

*How claim may be defeated*:—"It seems to be imagined . . . that because you cannot defeat a claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit a prendre, by shewing only that such right or profit was first taken or enjoyed at any time prior to the period of thirty years, therefore you cannot defeat it at all. I do not find that stated in Lord Tenterden's Act. There is no attempt in this case to defeat the claim by shewing only its origin, but by shewing that it never could have had a legal origin" (d).

*Easements—Way*:—"The first class of easements, of which mention is made in the second section of the Act (e), is rights of way. This can only refer to private rights of

(b) See section 38 (2) *infra*, for these words, "as of right."

(c) Brett, L.J., in *Earl De la Warr v. Miles*, 17 Ch. D. 591 (1881). Cf. *Lowry v. Crothers*, 1 R. 5 C. L. 98, enjoyment referable to agreement; *Warburton v. Parke*, 2 H. & N. 64 (1867), enjoyment referable to tenancy. For effect of tenant's acts in prejudice of landlord's rights, see *Papendick v. Bridgewater*, 5 Ell. & Bl. 166, 177 (1855), *Scholes v. Chadwick*, 2 Moo. & R. 50<sup>7</sup> (1843); *Reg. v. Bliss*, 7 Ad. & Ell. 550 (1838). For evidence of enjoyment, see *Commissioners of Sewers v. Glassey*, L. R. 19 Eq. 134 (1874).

(d) *Cresswell, J.*, in *Null v. New Forest*, 18 C. B. 70 (1856).

(e) Our section 35.

way, for it has already been shewn that public rights of way are not easements, and the law of prescription does not apply to rights of a public character "(f).

"*Or other easement*:"—The apparently wide signification of this phrase is cut down by *Webb v. Bird* (g), where Erle, C.J., says: "I am clearly of opinion that the 2nd section of the Statute meant to include only such easements upon or over the surface of the servient tenement as are susceptible of interruption (h) by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right."

*The right of lateral support to a building* :—The extent and nature of the right of an owner of an ancient building to lateral support of the lands, and whether such right (as far as it exists) is an easement within the Prescription Act, were discussed in *Dalton v. Angus* (i), and resulted in an extraordinary divergence of opinion among the Judges. The final decision in the House of Lords, was that a right of lateral support from adjoining lands may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. The judgment of Lord Selborne in this case is

(f) Goddard, *Law of Easements*, Amer. Ed. 138.

(g) 10 C. B. N. S. 283 (1861); 13 C. B. N. S. 13, case of claim to passage of wind to windmill. Cf. *Mounsay v. Ismay*, 3 H. & C. 486; *Branty v. Lefevere*, 4 C. P. D. 172, passage of air to chimneys; *Bass v. Gregory*, 25 Q. B. D. 481.

(h) i.e., interruption by some "reasonable mode," *Arkwright v. Gell*, 5 M. & W. 203, 234 (1839).

(i) 3 Q. B. D. 85; 4 Q. B. D. 162; 6 App. Cas. 740 (1881). See *Backus v. Smith*, 5 A. R. 341 (1880), decided while *Dalton v. Angus* was still before the courts. See *LeMarke v. Davies*, 19 Ch. D. 281, as to support from other buildings.

particularly instructive; his view being that it is "clear that any such right of support to a building, or part of a building is an easement;" and *semble* an easement within the Prescription Act.

*Watercourse, meaning of*:—Watercourse may be used to mean (i) the bed or channel in which water flows, and (ii), the stream or flow of water itself (*j*). The banks must be more or less defined and the flow possess a unity of character (*k*). But as soon as the water of a spring runs into a definite channel it becomes a watercourse (*l*).

*Watercourse, meaning in the Statute*:—Watercourse has been held to include the right to send water down the channel of the stream over the land of another (*m*); also to pollute the water of streams by pouring in impurities (*n*); also to divert the natural course of the stream from any particular land (*o*).

*Watercourse*:—See further, R. S. O. 1887, c. 220 (Ditches and Watercourses); c. 118 (Mills and Milldams); c. 119 (Water Privileges); c. 120 (Rivers and Streams).

*"Use of any water"*:—The right to enter land and to draw and take away water is an easement and not a *profit à prendre* (*p*).

*User cannot give title as against some and not against others*:—See *Bright v. Walker* (*q*).

(*j*) *Doe Egremont v. Williams*, 11 Q. B. 688 (1848).

(*k*) *Taylor v. St. Helens*, 6 Ch. D. 264 (1877); *Rawstron v. Taylor*, 11 Ex. 3, 69 (1855); *Broadbent v. Ramsbotham*, *Id.* 602 (1856); *Chasemore v. Richards*, 7 H. L. C. 349; *Briscoe v. Drought*, 11 Ir. C. L. R. 250, what instructions should be given to jury.

(*l*) *Dudden v. Clutton Union*, 1 H. & N. 627 (1857). As to artificial stream, see *Wood v. Wand*, 3 Ex. 748 (1849); *Smith v. Burnham*, L. R. 1 Ex. D. 419; *Rameshur v. Koonj*, L. R. 4 App. Cas. 121 (1878).

(*m*) *Wright v. Williams*, 1 M. & W. 77 (1836).

(*n*) *Id.* See also *Carlyon v. Lovering*, 1 H. & N. 784 (1857).

(*o*) *Mason v. Shrewsbury & Hereford Ry. Co.*, L. R. 6 Q. B. 578 (1871). Cf. *Staffordshire Co. v. Birmingham Co.*, L. R. 1 H. L. 254.

(*p*) *Race v. Ward*, 4 E. & B. 702. Cf. *Manning v. Wardale*, 3 A. & E. 758 (1836).

(*q*) 1 C. M. & R. 211 (1834). Cf. *Harris v. DePinna*, 33 Ch. D. 251.

*User by tenant over landlord's property* :—User by a tenant will not create an easement or right of way annexed to the fee simple of land belonging to the landlord (*r*).

"*Enjoyed by any person claiming right*" :—See *Tickle v. Brown* (*s*).

36. No person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building; but this section shall not apply to any such right which has been acquired by twenty years' use before the fifth day of March, 1880. 43 V. c. 14, s. 1.

Right to access and use of light by prescription abolished.

*5th day of March, 1880* :—This was the date of assent to 43 V. c. 14 (Ont.).

*Occasion for present section* :—The occasion for the present section is to be found in the decision in *Burnham v. Garvey* (*t*), which was to the effect that where a person had enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period even one day over nineteen years he could not be deprived thereof unless he subsequently submitted to an interruption of such easement for a period of twelve months. This unfortunate result of the law (as expressed by R. S. O. 1877, c. 108, s. 36), was in the same case severely commented on by Spragge, C., who said :—"I regret to have to put upon the statute the construction that has been put upon it in the case of *Flight v. Thomas* (*u*). I express no doubt of its correctness, but its effect is to reduce the time of limitation from twenty years to nineteen years and a day; an effect that must be a surprise upon owners of property, and an effect that scarcely could have been contemplated by the framers of the Act. . . . The

(*r*) *Bayley v. G. W. Ry. Co.*, 26 Ch. D. 441 (1884), citing *Grayford v. Moffatt*, L. R. 4 Ch. 133. Cf. *Russell v. Harford*, L. R. 2 Eq. 507; *Daniel v. Anderson*, 31 L. J. Ch. 610.

(*s*) 4 A. & Ell. 369, 382 (1836).

(*t*) 27 Gr. 80 (1879).

(*u*) 11 A. & E. 688 (1840); 8 Cl. & F. 231.

strange effect of the enactment can only be remedied by legislation. I may be permitted to add, that it is worth consideration whether any such provision as is made by section 36 of our Act (*v*) is suitable to the conditions and exigencies of a Canadian town. It would scarcely ever be applicable except in towns; and in towns the normal conditions are growth and extension. Section 36 interferes with the use which the owner of the soil ought, as a matter of right, to be allowed to make of it; and does this to give a right to a neighboring proprietor to use windows which he ought never to have placed there, otherwise than temporarily and subject to the right of the owner of the adjoining land to use it for building purposes. The effect is to nullify the ordinary common law right of the owner of the land to use it for his own purposes."

How the terms shall be calculated, and what acts only shall be an interruption to the prescription. Imp. Act. 2-3 W. IV., c. 71, s. 4.

37. Each of the respective periods of years in the last preceding three sections mentioned shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question; and no act or other matter shall be deemed an interruption within the meaning of the said three sections, unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making or authorizing the same to be made. R. S. O. 1877, c. 108, s. 37.

"*Next before some suit*" :—This means next before the commencement of some suit, not next before some act or acts complained of (*w*).

*The provision as to interruption may shorten period* :—In *Flight v. Thomas* (*x*) it was found that the statute conferred an easement when there had been actual enjoyment for nineteen years and a fraction, and then an interruption for the remainder of the twentieth year.

(*v*) i.e. R. S. O. 1877, c. 108, s. 36.

(*w*) See *Richards v. Fry*, 7 Ad. & El. 706 (1838), following *Wright v. Williams*, 1 M. & W. 77; cf. *Ward & Robins*, 15 M. & W. 242.

(*x*) *Flight v. Thomas*, 11 Ad. & El. 688; 8 Cl. & Fin. 231 (1841).



*Interruption by whom?* :—The interruption may be by the act of the owner, or of a stranger (*y*), but not of the claimant himself, as by his discontinuance of user (*z*). It is necessary that the claimant must have some further notice of the person authorizing the interruption than the existence of an obstruction (*u*).

*Evidence of interruption* :—See *Welcome v. Upton* (*b*), *Davies v. Williams* (*c*).

*Effect of interruption after twenty years' enjoyment* :—  
"The result of the interruption in 1882 or 1883 by the defendant, and the arrangement then made, seems to be that since that date the plaintiff must be taken to have maintained these pipes, not as a matter of right, but by the license of the defendant then given; in other words the interruption which then occurred was acquiesced in for considerably more than the year which is required by section 37 of c. 111, R. S. O., to constitute an interruption within the terms of that section; and as that section, taken in connection with section 35, only gives a party a right to an easement which has been enjoyed without interruption and under a claim of right for the full period of twenty years next before the action in which it is claimed, the mere fact that the period had expired before the interruption took place is immaterial" (*d*).

*Submission or acquiescence* :—In order to disprove any presumption of submission it does not appear to be necessary to bring an action against the interrupter or knock down the obstruction in the way of his user; it seems that

(*y*) See *Davies v. Williams*, 16 Q. B. 588.

(*z*) *Carr v. Foster*, 3 Q. B. 581; cf. *Hollins v. Verney*, 13 Q. B. D. 314; *Plasterers' Co. v. Parish Clerks' Co.*, 6 Ex. 630; *Hall v. Swift*, 4 Bing. N. C. 381; *Dare v. Heathcote*, 25 L. T. Ex. 245.

(*a*) *Seddon v. Bank of Bolton*, 19 Ch. D. 462 (1882).

(*b*) 6 M. & W. 536.

(*c*) *Supra*.

(*d*) *Street, J.*, in *McKay v. Bruce*, 20 O. R. 715 (1891).

a protest made to the interrupter (not to a third person) is evidence of non-submission. "In any case it must necessarily be a question of fact—has the party interrupted by his words or conduct, submitted to or acquiesced in the interruption, or has he resisted or protested against it" (e).

What allegation by the party claiming shall be sufficient. Imp. Act, 2-3 Wm. IV. c. 71, s. 5.

38. (1) In all pleadings wherein the party claiming may now allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same is denied, all and every the matters in the next preceding four sections of this Act mentioned and provided which are applicable to the case, shall be admissible in evidence to sustain or rebut such allegation.

What proof admitted for or against such allegation.

(2) In all pleadings wherein it would formerly have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this Act as are applicable to the case, and without claiming in the name or right of the owner of the fee as was usually done.

(3) If the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged, and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general denial of such allegation. R. S. O. 1877, c. 108, s. 38.

*Pleading under the Prescription Act:*—The old practice in pleading the Prescription Act is to be found in *Earl of Stamford v. Dunbar* (f), where Baron Alderson says: "It is usual in pleading a right of way to plead first, a prescriptive right; then a right of way existing for the last forty years; then a right of way existing for twenty years; and so of other rights under that statute."

(e) *Glover v. Coleman*, L. R. 10 C. P. 121 (1874). Cf. *Bennison v. Cartwright*, 5 B. & S. 1. See *Gale v. Abbott*, 10 W. R. 748, twelve months lapse after interruption; *Tibury v. Silva*, 45 Ch. D. 98, four years; *Warwick v. Queen's College*, L. R. 10 Eq. 105, submission by some, not by others.

(f) 13 M. & W. 827 (1845).

*Pleading enjoyment as of right*:—The words “as of right” constituted a legislative formula of which it was necessary to follow the very words; variations or omissions, such as the omission of “as,” gave good ground for demurrer (*g*).

*Pleading, present rules as to*:—The present rules affecting the practice in pleading are to be found in the Consolidated Rules (*h*).

*Matter of fact or of law*:—It is not usual under the modern practice to set forth the matters at law but to state the facts in the pleading and allow the Court to decide their legal result (*i*).

39. In the several cases mentioned in and provided for by this Act, of claims to lights, ways, water-courses or other easements, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as is applicable to the case and to the nature of the claim. R. S. O. 1877, c. 108, s. 39.

No presumption admissible on proof of enjoyment for a less period than prescribed by this Act.  
Imp. Act,  
2-3 Wm. IV.  
c. 71, s. 6.

*Meaning of section 39*:—“The meaning seems to be that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but where there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of grant” (*j*).

(*g*) 5 Q. B. 583 (1844). For meaning of “enjoyment as of right,” see *Earl de la Warr v. Miles*, 17 Ch. D. 591 (1881), and *Tickle v. Brown*, 4 Ad. & Ell 369, 382 (1836).

(*h*) See Rule 402.

(*i*) See *Hanmer v. Flight*, 35 L. T. N. S. 127.

(*j*) Lord Westbury in *Hanmer v. Chance*, 4 D. G. & J. 631 (1865). Cf. *Bright v. Walker*, 1 C. M. & R. 211, 222 (1834).

## DISABILITIES AND EXCEPTIONS.

## 1.—IN CASES OF EASEMENTS.

Time during which a party could not act not to be computed against him. Imp. Act, 2-3 Wm. IV. c. 71, s. 7.

40. The time during which any person otherwise capable of resisting any claim to any of the matters mentioned in sections 34 to 39 inclusive of this Act, is an infant, idiot, *non compos mentis*, or tenant for life, or during which any action has been pending and has been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the period in said sections mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible. R. S. O. 1877, c. 108, s. 40.

Terms of years, etc., excluded from computation in certain cases. Imp. Act, 2-3 Wm. IV. c. 71, s. 8.

41. Where any land or water upon, over or from which any such way or other easement, water-course or run of water has been enjoyed or derived, or has been held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim is, within three years next after the end, or sooner determination of such term, resisted by any person entitled to any reversion expectant on the determination thereof. R. S. O. 1877, c. 108, s. 41.

*Effect of section 40*:—"It is the intention of the Act that an enjoyment of thirty years, or twenty years, shall be of no avail against an idiot or other person labouring under incapacity, but that one of sixty or forty years shall confer an absolute title, even against parties under disabilities" (k).

*Tenant for life*:—Section 40 and section 37 are to be read together. "The defendant contends that the two sections are to be read together, so that the period is to be thirty years next before the action, excluding in the computation of those thirty years any tenancy for life. The plaintiff says that if there be a tenancy for life during any part of those thirty years, the time of that tenancy is to be excluded, and the thirty years cannot be computed at all. We think that the defendant's construction is the true

(k) Shelford, Real Property Statutes, 9th ed. 19, citing Wright v. Williams, 1 M. & W. 77.

one, and that if the plaintiff chooses to reply and set up a tenancy for life, he excludes the time of that tenancy, and drives the defendant to show thirty years of enjoyment either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended as in the present case" (*l*).

*Section 40 deals with all the periods, section 41 with one only:—*In speaking of the corresponding sections of the Imperial Act, Lord Campbell, C.J., said:—"Section 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the 'periods' thereinbefore 'mentioned'; and a twenty years' enjoyment is one of those periods. But section 8 provides for the exclusion of certain other times, among which is a tenancy of more than three years, not from the periods thereinbefore mentioned but from one particular period only, expressly mentioned, namely that of an enjoyment for forty years. It is clear, therefore, that it was not intended to exclude them from the computation of an enjoyment for twenty years" (*m*).

*To any reversion:—*The Court refused to apply the words "person entitled to any reversion" to a remainderman (*n*).

42. Nothing in sections 34 to 39 inclusive of this Act shall support or maintain any claim to any profit or benefit to be taken or enjoyed from or upon any land of our Sovereign Lady the Queen, her heirs and successors, or to any way or other easement, or to any water-course or the use of any water, to be enjoyed or derived upon, over or from any land or water of our said Lady the Queen, her heirs and successors, unless such land, way, easement, or water-course or other matters lies and is

Exception as to lands of the Crown not duly surveyed and laid out.

(*l*) Lord Denman in *Clayton v. Corby*, 2 Q. B. 824 (1842). See *Hale v. Oldroyd*, 14 M. & W. 739; *Bright v. Walker*, 1 C. M. & R. 222.

(*m*) *Palk v. Shinner*, 18 Ad. & Ell. 574 (1852). Cf. *Onley v. Gardiner*, 4 M. & W. 500.

(*n*) *Symons v. Leaker*, 15 Q. B. D. 632 (1885). The same point had been raised in *Laird v. Briggs*, 19 Ch. D. 32 (1881).

situate within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority. R. S. O. 1877, c. 108, s. 42.

*Occupation of soil under river* :—"It was further urged on behalf of the plaintiff that he has had a floating wharf, with a boat-house on it, for eleven years. . . . with a smaller structure preceding it going back for twenty years, and has thus got a title by occupation. But if my view be correct this is an interference with the free use of the river, reserved to the Crown, and the right to do so cannot be acquired in that way" (o).

*Can there be prescription of wild lands?*—"Another objection to the prescriptive right claimed by the plaintiff is to be found in the fact that for nearly the first half of the period down to 1882 or 1883, during which it is claimed to have been exercised, the land over which the right is claimed was unoccupied or in a state of nature, and its owners were out of the country" (p).

## 2.—IN CASES OF LAND OR RENT.

In cases of infancy, or lunacy at the time when the right of action accrues then five years to be allowed from termination of the disability or previous death.  
Imp. Acts, 3-4 Wm. IV. c. 27, s. 16;  
37-38 V. c. 57, s. 3.

43. If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues as in sections 4, 5, and 6 mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiotcy, lunacy or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

R. S. O. 1877, c. 108, s. 43.

Grandfoot, J., in *Retté v. Booth*, 10 O. R. 357 (1885); affirmed 14 A. R. 102 (1887), 15 App. Cas. 188.

(o) Street, J., in *McKay v. Bruce*, 20 O. R. 715 (1891).

*Saving as to disabilities applies to mortgage cases :—*  
"It is impossible without doing violence to the words of the statute to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land" (q).

*Infancy ; possession by father or uncle :—*A father in possession for his infant son, must be taken to be in possession as the bailiff of his son (r). Similarly, where the uncle entered as executor of the father's will, he was taken to be in possession for two infant daughters of the deceased (s).

*How infant may obtain title by possession :—*In *Re Goff* (t), trustees received the rent on behalf of an infant until she was of age, when she herself received the rent. On a question of ownership being raised more than ten years after the first receipt by the trustees of the rent, Proudfoot, V.C., said :—"Whether an infant could acquire the title by personal occupation need not be decided, as here the infant did not so occupy ; but there seems to me no question that persons assuming to possess for an infant, actually possessing, and accounting to her for the rents and profits, may thus acquire for the infant a title by possession. And it is of no importance whether the possession of the trustees was rightful or not."

*Coverture as a disability :—*The effect of coverture as a disability seems to have been removed by the Married Woman's Property Acts. Thus *Boyd, C.*, in *Cameron v.*

(q) *Strong, J.*, in *Faulds v. Harper*, 11 S. C. R. 655 (1886). See also *ib.* 2 O. R. 405 ; *Kinsman v. Rouse*, 17 Ch. D. 104 (1881) and *Forster v. Patterson*, 17 Ch. D. 132 (1881) not followed.

(r) *Re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553 (1887) ; *Thomas v. Thomas*, 2 K & J. 79, and *Wall v. Stannick*, 34 Ch. D. 763, cited.

(s) *Pelley v. Bascombe*, 9 Jur. N. S. 1120 ; 11 Jur. N. S. 52 (1865).

(t) 8 P. R. 95 (1879).

(u) 19 O. R. 220 (1890). Cf. *Lowe v. Fox*, 15 Q. B. D. 667 ; *Weldon v. Neal*, 51 L. T. 289.



*Walker, (u)* says:—"If the old law as to the status and rights of a husband after the birth of issue, in respect of his wife's land, had been left intact by legislation, I should have been forcibly impressed in favour of the view that the wife's right to recover was not affected by the Statute of Limitations. By that law it would seem that the husband as tenant by the curtesy initiate, might lease his wife's lands during his own life, and that as against him or his tenant, the wife would have no right of entry. . . . But as I have concluded that all interference on the part of the husband during the joint lives is ended by the first Married Woman's Act in the Province, this line of decision is no longer available."

"*Absence beyond seas*":—This was formerly among the disabilities enumerated by the Statute; it was struck out by 37-38 V. c. 57 (Imp.), s. 3 (v).

Twenty years utmost allowance for disabilities. Imp. Acts, 3 & 4 Wm IV. c. 27, s. 17; 37-38 V. c. 57, s. 5.

44. No entry, distress or action, shall be made or brought by any person, who, at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent, first accrued was under any of the disabilities hereinbefore mentioned; or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired. R. S. O. 1877, c. 108, s. 44.

*Absoluteness of the rule under this section*:—"As was said by Parke, B.: 'It is a strong thing to deprive a man of a right who has had no opportunity of exercising it,' but the Legislature and not the Court is responsible for having done it" (w).

"Section 44, of R. S. O. c. 108 (x), is in terms the same as the 17th section of the Imperial Act, 3 & 4 Wm. IV.

(v) 38 V. c. 16 (Ont.) s. 5.

(w) Armour, C.J., in *Hicks v. Williams*, 15 O. R. 228 (1888).

(x) The present section.

c. 27, and under section 17 of the Imperial Act, *Doe Corbyn v. Bramston* (y), was determined. . . . In this case Mary Hicks was dispossessed within terms of R. S. O. c. 108, s. 5, in 1853, more than twenty years before this action was brought, and so this action is clearly barred by section 44 of the same Act; for this action cannot be distinguished in principle from that of *Doe Corbyn v. Bramston* (z).

*Does section 44 alter the period for showing title :—*

There is no enactment in force in Ontario corresponding to 37 & 38 V. c. 78 (Imp.), s. 1, by which forty years is substituted for sixty years as the root of title. No new rule on the subject was introduced by the Statute of Limitations, 3 & 4 Wm. IV. (a); so the period is still sixty years in Ontario (b).

*Where money paid into court on expropriation :—*See *Ex p. Chamberlain* (c).

45. Where any person is under any of the disabilities here-  
inbefore mentioned, at the time at which his right to make an  
entry or distress, or to bring an action to recover any land or  
rents first accrues, and departs this life without having ceased  
to be under any such disability, no time to make an entry or  
distress, or to bring an action to recover such land or rent  
beyond the said period of ten years next after the right of such  
person to make an entry or distress, or to bring an action to  
recover such land or rent, first accrued or the said period of five  
years next after the time at which such person died, shall be  
allowed by reason of any disability of any other person. R. S. O.  
1877, c. 108, s. 45.

No further  
time to be  
allowed for  
a succession  
of disabili-  
ties. Imp.  
Act, 3-4 W.  
IV., c. 27.  
s. 18; 37-38  
V. c. 57,  
s. 9.

*Successive disabilities :—*See *Devine v. Holloway* (d);  
*Borrows v. Elleson* (e).

(y) 3 Ad. & El. 63; cf. *Jumpson v. Pitchers*, 13 Sim. 327.

(z) *Hicks v. Williams*, *supra*. See further, *Fulton v. Creagh*, 3 J. & Lat. 329 (1846), case of lease made by lunatic.

(a) *Cooper v. Emery*, 1 Ph. 389 (1844); *Moulton v. Edmonds*, 1 D. F. & J. 250 (1850).

(b) See *Armour on Titles*, pp. 27, 29.

(c) 14 Ch. D. 328 (1880).

(d) 14 Moore, P. C. C. 290, retrospective operation.

(e) L. R. 6 Ex. 128, successive disabilities in same person.

H. R. P. S.—32

*Former rule as to succession of disabilities*:—The old rule as to a succession of disabilities is thus stated by Preston:—"But if the right first accrues to a person who is at that time under a disability, the time will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue to him a protection against being barred by non-claim; but any cessation of disability will call the Statute into operative force, and no subsequent disability will arrest the bar produced by the Statute" (*f*).

A FURTHER EXCEPTION.

*Statute of Limitations excluded by words in private Act*:—See *Mayor of Brighton v. Guardians of Brighton* (*g*); *Earl of Abergavenny v. Brace* (*h*).

(*f*) Abstracts Vol. II. 340 (1818). Cf. *Murray v. Watkins*, 62 L. T. 796 (1890), Statute continues when once started to run.

(*g*) L. R. 5 C. P. D. 368 (1880).

(*h*) L. R. 7 Ex. 145.

O. c. 111.

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## R. S. O. 1887, CHAPTER 112.

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R. S. O. 1887, CHAPTER 112.

An Act to amend the Law of Vendor and Purchaser  
and to Simplify Titles.

HER MAJESTY, by and with the advice and consent  
of the Legislative Assembly of the Province of  
Ontario, enacts as follows:—

1. In the completion of any contract of sale of land made after the 10th day of February, 1876, the rights and obligations of vendors and purchasers shall be regulated by the following rules (but subject to any stipulation in such contract to the contrary), namely:—

Rights of  
vendors and  
purchasers  
in contracts  
of sale of  
lands.

"10th day of February, 1876":—The present Act is adapted from the Imperial Vendor and Purchaser Act, 1874 (a). Our Act was 39 V. c. 29 (Ont.), which was assented to 10th February, 1876 (b).

*Length of time required for root of title*:—Our Legislature has not adopted the provision of the Imperial Act (c), substituting forty years for sixty years as the period of commencement of title.

(1) Recitals, statements and description of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.

Recital,  
etc., 20  
years old,  
of facts,  
etc., *prima*  
*facie* evi-  
dence.

*What are recitals of fact?*:—"The Legislature has, in my opinion, most wisely provided that . . . any

(a) 37 & 38 V. c. 78 (Imp.).

(b) By a misprint, the assent is dated 19th February, 1876, in the Statutes for 39 Victoria.

(c) See notes under R. S. O. 1887, c. 111, s. 44.

recitals, statements and descriptions of facts, matters and parties contained in a deed or Act of Parliament which is twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts. What does this abstract which has been delivered contain? It begins the 25th of November, 1853, with a purchase deed by which S. W. conveys to the testator in the cause, and it contained this recital, that W., that is, the vendor, was seised in fee simple in possession of the said several pieces of ground. Mr. H. says that is not a statement of fact, but a proposition of law. I beg to express my opinion that it is a statement of fact, that he was not only in possession, but he was in possession in fee simple of the pieces of land which were conveyed. Therefore, that relieves the plaintiffs from the necessity of showing a forty years' title, because they have a deed twenty years old, which recites that the then vendor was seised in fee simple. This, in my opinion, was a perfectly good commencement of title. . . . If you say A. B. is in possession of Blackacre, that is a fact. Then you say, is he in possession for so many years, or as tenant for life or tenant in fee? He is in possession as tenant in fee. That is a fact. I think this is a most beneficial enactment. . . . The recital in the deed of 1853 is not conclusive, it is only *prima facie* evidence; but those who object to it must show that it is untrue"(d).

*Recital of trust deed*:—A recital in a deed over twenty years old that the sale was in pursuance of a trust for sale contained in another deed was held conclusive evidence, not being shown to be inaccurate, that the trust deed had not been revoked (e).

(d) Malins, V.C., in *Bolton v. London School Board*, 7 Ch. D. 766 (1878). See *Wimbledon Local Board v. Croydon Rural Sanitary Authority*, 32 Ch. D. 421. See also *Armour*, on Titles, pp. 33, 34.

(e) *Re Marsh and Granville*, 24 Ch. D. 11.



(2) Registered memorials of discharged mortgages shall be sufficient evidence of the mortgages without the production of the mortgages themselves, unless and except so far as such memorials are proved to be inaccurate; and the vendor shall not be bound to produce the mortgages unless they appear to be in his possession or power.

Memorials of discharged mortgages.

(3) In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, or in other cases, if possession has been consistent with the registered title, the memorials shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials are proved to be inaccurate; and the vendor shall not be bound to produce the original instruments unless they appear to be in his possession or power; and the memorials shall be presumed to contain all the material contents of the instruments to which they relate.

Memorials 20 years old, when, and of what evidence.

Receipt in a conveyance.

*Trusts of one deed recited in memorial of another:—*  
The production of a memorial of a deed of appointment reciting the trusts under a deed of trust, such memorial being over twenty years old, is sufficient evidence of what those trusts were (f).

*Possession must be of the land in question:—*"The primary object of the statute being to simplify the proof of titles between vendor and purchaser, it is obvious that the possession spoken of is possession of the very land to which title is being made; and the extension of the same rule to proof of title in an action gives it no larger effect, but leaves it to be read as applying to the possession of the very land, the title to which has to be proved in the action" (g).

(4) The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to the title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents. R. S. O. 1877, c. 109, s. 1.

Inability to furnish covenant to produce and furnish documents of title.

(f) *Re Ponton and Swanston*, 11 O. R. 669 (1889), Boyd, C.

(g) *Patterson, J.A., in Van Velsor v. Hughson*, 9 A. R. 401 (1882).

*Right of purchaser to copies*:—"The purchaser is, in my opinion, entitled to the production of the deeds . . . and if they cannot be produced, to certified copies of the memorials of such of them as were registered by memorial only, and to certified copies of such as are themselves registered" (h).

Evidence  
in actions.

2. In actions it shall not be necessary to produce any evidence which, by section 1 of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of such actions. R. S. O. 1877, c. 109, s. 2. See also c. 61, s. 49.

Summary  
applications  
to High  
Court in  
respect to  
requisitions,  
objections  
or compen-  
sation, etc.

3. A vendor or purchaser of real or leasehold estate or their representatives respectively may at any time or times and from time to time apply in a summary way to the High Court, or a Judge thereof in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract); and the Judge shall make such order upon the application as to him appears just, by reference to the Master or otherwise, and shall order how and by whom all or any of the costs of and incidental to the application shall be borne and paid. R. S. O. 1877, c. 109, s. 3.

Costs.

*"Any requisitions or objections"*:—It seems that not only may the Court consider the objections actually taken by counsel for the purchaser, but also the Court may suggest objections to title and give effect to such objections by refusing to compel the purchaser to complete the purchase (i).

*"Or any claim for compensation"*:—Compensation may be given under this section even although the purchaser has, in ignorance of the misdescription for which he might claim compensation, taken a conveyance (j).

(h) *Re Bobier and Ontario Investment Co.*, 16 O. R. 262 (1888), per Armour, C.J., following *McIntosh v. Rogers*, 12 P. R. 389.

(i) *Re Treleven and Horner*, 28 Gr. 624 (1881), Blake, V.C.

(j) *Re Turner and Skelton*, 13 Ch. D. 130 (1879). See further, on compensation *re Herbalt*, 57 L.J. Ch. D. 421 (1887); *Aspinalls to Powell*, 60 L. T. 595 (1888); *Re Orange and Wright*, 52 L. T. 606 (1884).

*"Affecting the existence or validity of the contract":—*  
The present section is intended for simple cases where there is no dispute as to the *validity of the contract* between the parties, *i.e.* when the relation of vendor and purchaser is established or not denied, but where the *validity of the vendor's title* is in dispute, and the parties wish the opinion of the Court on the questions of title that have been raised. Unless and until the contract is admitted (or decided) to be binding, the Court ought not to enter upon the question of the validity of the title, *i.e.* ought not to entertain an application under this section (*k*).

*What questions will be settled by the Court?—*The Courts have in general shewn a very liberal spirit in deciding what questions come within the jurisdiction conferred by this section; in fact the subjects dealt with have a very wide range. We may attempt however a rough classification:

*Questions as to the reasonableness of requisitions:—*  
Requisition as to completeness of abstract (*l*); vendor's refusal to answer (*m*).

*Right to convey:—*Whether an heir can make good title (*n*); or a devisee (*o*); or a compounding debtor (*p*); whether vendor had right to convey (*q*); whether the contract is a valid exercise of power of sale or appoint-

(*k*) *Re Robertson and Daganeau*, 9 P. R. 288 (1882), *Boyd, C.*, declining to follow *re Henderson and Spencer*, 8 P. R. 402. See also *re McNabb*, 1 O. R. 94 (1882); *re Hargreaves and Thompson*, 32 Ch. D. 459 (1886); *re Davis and Cavey*, 40 Ch. D. 608 (1888), fraudulent misrepresentation affects *validity of contract*; *re Sandbach and Edmondson* (1891), 1 Ch. 102, misleading condition; *re Popple and Barratt*, 25 W. R. 248 (1876); *re Gray and Metropolitan Ry. Co.*, 44 L. T. 567 (1881), disputed questions of fact. But see also *re Lander and Bagley* (1892), 3 Ch. 41, 50, construction of contract.

(*l*) *Re Ford and Hill*, 10 Ch. D. 365 (1879).

(*m*) *Re Glenton and Saunders*, 53 L. T. 434 (1886).

(*n*) *Re Morton and Hallett*, 15 Ch. D. 143 (1880).

(*o*) *Osborne to Rowlett*, 13 Ch. D. 774 (1880).

(*p*) *Re Kearley and Clayton*, 7 Ch. D. 615 (1877).

(*q*) *Re Harman and Uxbridge Ry.*, 49 L. T. 130 (1883).

ment (*r*); whether entail barred (*s*); whether trustees properly appointed (*t*); whether title could be made by trustees (*u*); or an administrator (*v*); or an executor (*w*).

Several cases have arisen in our Ontario Courts, dealing with doubts as to the sufficiency of a conveyance by a vendor in a fiduciary position, the beneficiaries joining to give their assent. Thus we have had cases involving: the ability of the petitioner to convey a fee simple where he had made a post-nuptial settlement (*x*); the right of the trustee and beneficiaries under a will to convey before the time fixed by the will for the sale of the property (*y*); the sufficiency of a conveyance by all parties interested, during the life of the life tenant (*z*); the sufficiency of the consent of two executors, where the consent of three executors was required to a sale and one executor was deceased (*a*).

*As to incumbrances*:—Whether vendor bound to apply under R. S. O. 1887, c. 100, s. 15 (*b*); question as to a

(*r*) *Re Irish Soc. and O'Keefe*, 7 L. R. Ir. 136 (1881); *re Frith and Osborne*, 3 Ch. D. 618 (1876); *re St. Saviours*, 31 Ch. D. 412 (1886); *Nichols to Nixey*, 29 Ch. D. 1005 (1885).

(*s*) *Re Dudson*, 8 Ch. D. 628 (1878).

(*t*) *Re Glenny and Hartley*, 25 Ch. D. 611 (1884); *re Coates to Parsons*, 34 Ch. D. 370 (1886); *re Walker and Hughes*, 24 Ch. D. 698 (1883).

(*u*) *Re Wright and Marshall*, 28 Ch. D. 93 (1885); *Patten to Edmonton*, 48 L. T. 870 (1882); *re Arbib and Class*, 1891, 1 Ch. 601.

(*v*) *Re Clay and Tetley*, 16 Ch. D. 3 (1880); *re Adams and Kensington*, 27 Ch. D. 394 (1884).

(*w*) *Re Tanqueray-William*, 20 Ch. D. 465 (1882); *Re Whistler*, 35 Ch. D. 561 (1886).

(*x*) *Re Bingham and Wigglesworth*, 5 O. R. 611 (1882), application entertained with hesitation on the part of the Court. Cf. *re Foster and Lister*, 36 L. T. 582 (1876).

(*y*) *Givins v. Davrill*, 27 Gr. 502 (1880).

(*z*) *Re Rathbone and White*, 22 O. R. 550 (1892); see *re Cooke*, 4 Ch. D. 454 (1876). Cf. *re Ailesbury Settled Estates* (1893), 3 R. 704, as to sufficiency of conveyance by life tenant without consent of wife.

(*a*) *Re MacNabb*, 1 O. R. 94 (1882). Cf. *re Waddell*, 2 Ch. D. 172 (1876); *re Metropolitan Bank and Jones*, 2 Ch. D. 366 (1876); *re Kidd and Gibson* (1893), 2 Ch. 695.

(*b*) 44 & 45 V. c. 41 (Imp.), s. 5; *Re Great Northern Ry. Co. and Sanderson*, 25 Ch. D. 788 (1884).

debenture charge (*c*); whether joint receipt of different mortgagees sufficient (*d*); whether receipt of married woman for legacy discharged property (*e*); whether common rights existed (*f*).

*Construction of wills*:—Meaning of bequest to next of kin (*g*); whether wife took absolutely (*h*); application to wills of rule in *Shelley's Case* (*i*); gift to class capable of taking (*j*); whether devise passed mortgages (*k*).

*Questions of adjustment*:—Applications are admissible which petition the Court to deal with questions of adjustment prior to closing, *e.g.* questions as to adjustment of taxes (*l*).

*Costs of investigation of title*:—Who should pay for production of documents of title (*m*); who should pay for searches in the registry office (*n*).

*Can question of abandonment be raised?*—"The question of abandonment of the contract cannot be raised on the application under section 3 of the statute" (*o*).

*Can question of rescission be raised?*—"The question whether a power to rescind has been well exercised has often been decided by the Court upon a summons under

(*c*) *Re Horne and Hellard*, 29 Ch. D. 736 (1885).

(*d*) *Re Parker and Beech*, 56 L. T. 95 (1886).

(*e*) *Re Coward and Adam*, L. R. 20 Eq. 179 (1875).

(*f*) *Re Bridge and Macrae*, 30 W. R. 539 (1881).

(*g*) *Sturge and G. W. Ry. Co.*, 19 Ch. D. 444 (1881).

(*h*) *Re Hutchinson and Tenant*, 8 Ch. D. 546 (1878).

(*i*) *Re White and Hindle*, 7 Ch. D. 201 (1877).

(*j*) *Re Coleman and Jarrom*, 4 Ch. D. 165 (1876).

(*k*) *Re Packham and Moss*, 1 Ch. D. 214 (1875).

(*l*) *Re Wilson and Houston*, 20 O. R. 532 (1891).

(*m*) *Willett v. Argente*, 60 L. T. 735 (1888).

(*n*) *Re Murray and Haggarty*, 15 L. R. Ir. 510 (1884). Cf. *re Hetlings & Merton's Contract* (1893), 2 R. 543.

(*o*) *Re Henderson and Spencer*, 8 P. R. 402; but see *re Robertson and Daganau*, 9 P. R. 288 (1882).

this section. *In re Dames and Wood* (p) is one of such cases" (q).

*Miscellaneous*:—Whether lease properly granted (r); whether trustees can be required to receive money personally (s); whether covenants had been performed (t); as to succession duty (u); sufficiency of stamp on deed (v).

"The Court has also decided other questions; e.g. what should be the form of conveyance (*re Piggott and G. W. R. Co.*, 18 Ch. D. 146); whether particular covenants should be inserted (*re Agg Gardner*, 25 Ch. D. 600; *re Moncton and Gilzean*, 27 Ch. D. 555; *re Gray and Metropolitan R. Co.*, 44 L. T. 567; *re Sanger and Baring*, 51 L. T. 356; *re Mordy and Courtenay*, *ib.* 721; *re Lauder and Bagley*, 1892, W. N. 119); who had the right to deeds (*re Doherty*, 15 L. R. Ir. 247); whether the purchaser was entitled to a rent charge as an indemnity against rent (*ib.*); whether a purchaser was entitled to damages for non-repair paid to the vendor by a former tenant (*re Edie and Brown*, 58 L. T. 307); . . . whether a right of way was included in the contract (*re Lavery and Kirk*, 33 S. J. 127); whether a purchaser was bound by a condition of sale alleged to be misleading (*re Marsh and Granville*, 24 Ch. D. 11; *re Sandbach and Edmondson* (1891), 1 Ch. 99)" (w).

(p) 29 Ch. D. 626.

(q) *Re Jackson and Woodburn*, 37 Ch. D. 47 (1887). Cf. *re Jackson and Oakshutt*, 14 Ch. D. 851 (1880); *re Arbib and Class*, 1891, 1 Ch. 601; *re Gloag and Miller*, 23 Ch. D. 320 (1883); *Moncton and Gilzean*, 27 Ch. D. 555 (1884); *G. N. R. Co. v. Sanderson*, 25 Ch. D. 788 (1884).

(r) *Hallett to Martin*, 24 Ch. D. 624 (1883).

(s) *Re Bellamy*, 24 Ch. D. 387 (1883); *re Flower*, 27 Ch. D. 592 (1884).

(t) *Ringer to Thompson*, 45 L. T. 580 (1881).

(u) *Re Warren*, 17 Ch. D. 711 (1881); *re Cooper and Allen*, 4 Ch. D. 802 (1876).

(v) *Whiting to Loomes*, 17 Ch. D. 10 (1881).

(w) *Shelford's Real Property Statutes*, 9th ed. p. 570. See *ib.* p. 571, for cases on English practice under this Act.

*The Courts do not mean to act as conveyancing counsel:—*It is not to be supposed that the Courts are to be used on all occasions for the mere purpose of answering requisitions on title. Thus to *re Bingham and Wrigglesworth* (x) the following significant note is appended: "In consenting to entertain their petition, at the desire of both parties, the learned Judge observed that he nevertheless did not desire to make a precedent in practice, under the Vendor and Purchaser Act, of entertaining petitions on all questions of a like kind, as he thought he saw undesirable consequences, if all questions of title were to be settled in this way, when the existence or validity of the contract was not disputed."

"The object of the Legislature was to enable either vendor or purchaser to obtain the decision of the Court upon some isolated point instead of being compelled to have recourse to the whole machinery which would be put in motion by an action or suit for specific performance" (y).

*What parties necessary to proceedings:—*"The only parties who need be represented are those who would be parties to a suit for specific performance with a reference as to title: in *re Eaton Estate* (z); and the general rule is, that all the parties to the contract should be parties to the suit, and no one else (a). The mortgagee may be a necessary party to the conveyance, but that is not a question of title (b). The mortgagees in this case should not therefore have been served, and they will be dismissed with their costs. I do not find anything in *Henderson v. Spencer* (c),

(x) 5 O. R. 612 (1882).

(y) Lindley, L.J., in *re Hargreaves and Thompson*, 32 Ch. D. 459 (1886). Cf. *re Popple and Barratt*, 25 W. R. 248 (1877).

(z) 7 P. R. 296.

(a) Citing Fry, 2nd ed. p. 62; see 3rd ed. p. 73. Cf. *re Naylor and Spendla*, 34 Ch. D. 220 (1886); *re Tippet and Newbold*, 37 Ch. D. 444 (1888).

(b) Citing *ib.* 63; see 3rd ed. p. 74.

(c) 8 P. R. 402.



to shew that the mortgagees should have moved against the petition. I think they have a right to take the objection at the hearing" (d).

"*Shall make such order*":—"The only jurisdiction we have on this form of proceedings is whatever the Act of Parliament has authorized the Court to do, and in my opinion we ought not to treat an application under this section in the same way as if an action were brought for specific performance or for rescinding the contract, or for any other purpose, but we must see what is the consequence of that which we have decided, and which the Act of Parliament undoubtedly gave us authority to decide" (e).

*Relief to which purchaser entitled*:—Accordingly, in a case where the vendor's title was shewn to be defective and the purchaser asked not only for a return of deposit but also for interest on the deposit (f) and the costs of investigating the title (g), the Court examined his rights in the following manner: "Although no doubt interest cannot be given on the deposit except by way of damages, and the cost of investigating the title would not be given to the purchaser if he brought an action, except by way of damages, yet they are damages which, without any special case being made would be awarded, and properly awarded, either by a judge or by a jury in a case where the vendor could not make a good title to that which he had purported to sell. And in my opinion this Act of Parliament authorizes us not only to make an order for the return of the deposit, but to give in addition that

(d) *Re McNabb*, 1 O. R. 97 (1882).

(e) Cotton, L.J., in *re Hargreaves and Thompson*, 32 Ch. D. 456 (1886).

(f) Cf. *re Cash and Metropolitan Dist. R. Co.*, 13 Ch. D. 607 (1880); *re Smith and Stott*, 48 L. T. 512 (1882).

(g) Cf. *re Ebsworth and Tidy*, 42 Ch. D. 53 (1889); *re Bryant and Birmingham*, 44 Ch. D. 218 (1890); *re Higgins and Percival*, 59 L. T. 213 (1888); see further *re Beyfus and Master*, 39 Ch. D. 110 (1888).

which, without any special circumstances and under ordinary circumstances, would be the consequence if an action had been brought to recover damages" (h).

*May order costs to be charged on vendor's property:—* In *re Yielding and Westbrook* (i) there is the following brief decision: "The deposit must be repaid with interest, and the purchaser must have the cost of the summons, including his costs of investigating the title. The costs will be charged on the vendor's interest in the property. In making this order I follow the decision of Vice-Chancellor Hall in *In re Higgins and Hitchman's Contract* (j). If that was an innovation, I think it was a good one."

The Court may order the payment of interest and decide from what date it is to be reckoned (k); and may, it seems, order the repayment of interest paid by the purchaser under protest (l).

*Order, where former order not complied with:—* Where an order made under this Act directed the purchaser to carry out his contract to purchase forthwith, and he failed to do so, Ferguson, J., made an order directing him to carry out his contract in obedience to the former order within two weeks; and in default for the vendor to be at liberty to re-sell, the purchaser to pay the costs of this motion, all costs of the re-sale, and any deficiency (m).

*Order, where cases conflict:—* Where the effect of the authorities is to leave the title doubtful the Court will not force it upon a purchaser (n).

(h) *Re Hargreaves and Thompson*, 32 Ch. D. 457 (1886). But see *re Davis and Cavey*, 40 Ch. D. 607 (1888).

(i) 31 Ch. D. 345 (1886).

(j) 21 Ch. D. 95 (1882).

(k) *Re Riley to Steatfield*, 34 Ch. D. 386 (1886), *re Golds and Newton*, 52 L. T. 321 not followed; cf. *re Piggot and G. W. R. Co.* 18 Ch. D. 146 (1881); *re Hetling and Merton's Contract* (1893), 2 R. 543.

(l) *Re Young and Harston*, 31 Ch. D. 168 (1885).

(m) *Re Craig*, 10 P. R. 33 (1883); *Thompson v. Ringer*, 44 L. T. 507 cited.

(n) *Re McNabb*, 1 O. R. 94 (1882). But see *Osborne to Rowlett*, 13 Ch. D. 81 (1880).

*Effect of order on right to bring other actions:*—The order should not prejudice the right of a purchaser to bring an action to have a contract rescinded or to resist suit for specific performance (o); nor of a vendor to sue for specific performance (p).

*How far others than parties before the Court are bound:*—"It must be borne in mind that any such decision does not technically bind any one else but the parties actually before the Court, and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title" (q).

*Scope of proceedings under this Act:*—"Whatever could be done in Chambers upon a reference as to title under a decree where the contract was established, can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once to put themselves in Chambers in exactly the same position in which they would have been, and with all the rights which they would have had under the old form of decree" (r).

*What evidence may be given:*—"Affidavits may be received on any question that could have been tried in that way in the Master's office on an investigation of title under decree—as, for instance whether a good title had been shewn to a portion of the land, as in *re Burroughs etc.*, *supra*" (s).

(o) *Henderson v. Spencer*, 8 P. R. 402 (1881).

(p) *Re Boustead and Warwick*, 12 O. R. 488 (1886).

(q) *Osborne to Rowlett*, *supra*. Cf. *re Cooper and Allen*, 4 Ch. D. 827 (1876), as to binding the Crown.

(r) *Re Burroughs*, *Lynn and Sexton*, 5 Ch. D. 604 (1877), cited in *re MacNabb*, *infra*.

(s) *Re MacNabb*, 1 O. R. 97 (1882). As to strength of evidence required, see *re Morton*, 7 O. R. 95 (1884).

*What evidence purchaser entitled to demand:—*In a case where a title by possession was evidenced by statutory declarations, Proudfoot, J., says :—

"The statute for the suppression of voluntary oaths, 37 V. c. 37 (*t*), though it renders the person making a false declaration guilty of a misdemeanor, does not make the declaration evidence. And it is obvious that such declarations are not of such value as evidence under oath, for though the civil penalty for a false declaration is the same as for perjury yet it wants the sanctity of the oath. A man might be ready to run the risk of punishment for a misdemeanor who would not be willing to offend the Almighty by deliberate perjury.

"Title by possession can only be proved by the evidence of witnesses. And when title is being examined by counsel out of Court it is probable that these declarations would generally be accepted as sufficient proof of possession. The rule in practice is not, without sufficient cause, to require the formal evidence which would be necessary in an action: Sugden, V. & P. 4th ed. 417. In the present case there is no suggestion of any reason for doubting the truth of the declarations.

"But in a purchase of this magnitude, about \$9,000, I cannot say that the purchaser is too exacting in requiring the best evidence that can be had to establish the title. As his counsel rested his objection chiefly on the ground that the evidence was not under oath, and not subject to cross examination, this objection may be obviated by directing the seller to procure affidavits from the declarants, which will no longer be obnoxious to the charge of being voluntary, where the purchaser can cross-examine the deponents. If not satisfied with this, though I may think him unreasonable, the purchaser is entitled to have the

(*t*) Cf. Canada Evidence Act, 1893.

evidence taken *viva voce* and have his title sanctioned by a decree. In that case I give the seller leave to institute a suit for specific performance, as without this there would seem to be some doubt whether he could do so after taking proceedings under the Act; and all costs will be reserved to be dealt with by the judge at the hearing. If the purchaser will be satisfied with affidavit evidence and the seller establishes his title, there should be no costs to either party; if he fails to prove title the seller should pay costs" (u).

"*The costs of and incidental to the application*":—  
"The costs of applications under this Act are in the discretion of the Judge, but I think the same rules should apply as in regard to special cases under the Imperial Statute, 13 & 14 V. c. 35: *Morgan v. Davey*, and it seems that in general the costs of such cases are governed by the same rules that regulate the costs of a suit instituted by bill: *Usticke v. Peters* (v), and in that case a plaintiff succeeding upon a special case arising out of the construction of a will was entitled to his costs from the defendant. Following that case I think the defendant must pay the costs" (w).

What "*incidental*" may include:—Where the purchaser failed to carry out the purchase in accordance with an order under this Act, and the Court on motion of the petitioner made a further order allowing a re-sale at the end of two weeks, the purchaser was ordered to pay the costs of such motion, all costs of the re-sale and any deficiency (x).

(u) *Re Boustead and Warwick*, 12 O. R. 488 (1886).

(v) 4 K. & J. 437.

(w) *Proudfoot, V.C.*, in *Givins v. Davrill*, 27 Gr. 507 (1880), citing also *re Mercer and Moore*, 14 Ch. D. 287, 296. Generally the costs follow the event; *re Starr Bowkett Society and Sibun*, 42 Ch. D. 386 (1889). Cf. *re Davis and Cavey*, 40 Ch. D. 609 (1888); *re Johnson and Tustin*, 30 Ch. D. 42 (1885).

(x) *Re Craig*, 10 P. R. 33 (1883).

*Extra costs caused by improper claim:*—Where extra costs were occasioned by the purchaser making claim on more land than was contracted for, the Court ordered him to pay the costs occasioned by his making such claim; all the other costs to be borne by the vendors (*y*).

*Assure the title, make the purchaser pay the costs:*—“Upon the question of costs I do not consider that, because a particular title may be one which a conveyancer would not recommend a purchaser to accept without a decision of the Court, the purchaser ought not to pay costs if the Court is of opinion that a good title can be made; on the contrary the general rule is to order the purchaser to pay the costs so as to assure his title and shew that the Court entertains no doubt upon it. However in the present instance, as the difficulty has arisen entirely from conflicting decisions, I make no order as to costs; but it must be distinctly understood that that is not because I have any doubt as to the title” (*z*).

*Costs where there is a fair point for discussion:*—In *re Metropolitan Dist. R. Co. and Cash* (*a*), Fry, J., said: “There was a fair point for discussion in the present case and I shall make no order as to costs.”

*Nor where deeds invite inquiry:*—No costs were given to either party in a case where the deeds had been drawn in a mode which seemed to invite inquiry, although the Court was in no doubt as to their operation and effect (*b*).

(*y*) *Re Bobier and Ontario Investment Co.*, 16 O. R. 263 (1888).

(*z*) Jessel, M.R., in *Osborne to Rowlett*, 13 Ch. D. 798 (1880). Cf. *re Coward and Adams*, 20 Eq. 179 (1875).

(*a*) 13 Ch. D. 613 (1880). Cf. *re Great Northern Ry. Co. and Sanderson*, 25 Ch. D. 794 (1884); *Finch v. Jukes* (1877), W. N. 211.

(*b*) *Lucas v. Hamilton Real Estate Association*, 26 Gr. 384 (1879).

), citing also  
follow the  
889). Cf. *re*  
30 Ch. D. 42

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R. S. O. 1887, CHAPTER 115.

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R. S. O. 1887, CHAPTER 115.

An Act respecting the Custody of Documents  
relating to Land Titles.

SHORT TITLE, s. 1.  
INTERPRETATION, s. 2.  
DEPOSIT OF DOCUMENTS, ss. 3, 4.  
DOCUMENTS TO BE NUMBERED AND  
INDEXED, s. 5.  
NOTICE OF DEPOSIT, s. 6.  
REGISTRAR'S FEES, ss. 7, 8.

INSPECTION OF DOCUMENTS, s. 9.  
EFFECT OF DEPOSIT, ss. 10, 11.  
REGISTRAR TO KEEP SAFELY, s. 12.  
EXPENSES OF EXECUTORS, s. 13.  
REMOVAL OF DOCUMENTS FROM CUS-  
TODY OF REGISTRAR, ss. 14, 15.

115.

HER MAJESTY, by and with the advice and consent  
of the Legislative Assembly of the Province of  
Ontario, enacts as follows:—

1. This Act may be cited as "*The Custody of Title Deeds Act*," and shall be read as part of *The Registry Act*. 50 V. c. 14, s. 1. Short title. 56 V. c. 21.

2. The word "document," herein, shall be held to include the word "instrument," as defined by *The Registry Act*, and also any certificate, affidavit, statutory declaration, or other proof as to the birth, baptism, marriage, divorce, death, burial, descendants, or pedigree of any person, or as to the existence or non-existence, happening or non-happening of any fact, event or occurrence upon which the title to land may depend, and notices of sale, or other notices necessary to the exercise of any power of sale or appointment or other powers relating to land. 50 V. c. 14, s. 2. Interpretation. 56 V. c. 21.

3. Any person having any document, forming or being a title-deed or evidence or muniment of title to land in this Province may deposit the same for safe custody in the office of the registrar of any registry division in which the document or a duplicate or copy or memorial or certificate thereof has been registered; or in case it does not appear by any endorsement thereon, that the same or a duplicate or copy or memorial or Person having custody of deeds, etc., may deposit them in registry office.

certificate thereof has been registered in any registry office in Ontario, the document may be so deposited in the office of the registrar of any registry division in which any land to which the same relates is situate. 50 V. c. 14, s. 3.

Requisition to be filed and receipt given.

4. Upon every such deposit, the person depositing shall deliver to the registrar a requisition in duplicate in the form A hereto; which requisition may include any number of documents; and the registrar shall sign a receipt upon one of the duplicates for the instruments or documents therein mentioned, and shall deliver the receipt to the person by whom the deposit is made. 50 V. c. 14, s. 4.

Each document to be numbered and entered in deposit index and filed.

5. (1) Upon receiving the requisition and the documents therein mentioned, the registrar shall enter every document in consecutive order in a book to be kept by him for that purpose, to be called the "deposit index" (which may be in the form B hereto), and shall therein number all deposited documents consecutively, and shall endorse on every such document the word "deposited," with the date of deposit and the number of the entry thereof in the deposit index; and shall file the same in consecutive order according to its number; and shall also endorse on the requisition the numbers so by him placed on the documents therein mentioned; and shall file all the requisitions in consecutive order according to such numbers.

Names to be entered in alphabetical index.

(2) The registrar shall also enter in an alphabetical index to be kept by him for that purpose (and which shall be called the "Alphabetical Deposit Index"), the number of the document in the deposit index, and the name of every party to the document, or to the action, suit or proceeding to which the document relates, or if the same is a certificate or an affidavit, or a statutory declaration or other proof, as to the birth, baptism, marriage, divorce, death or burial of any person, then the name of such person.

Entry opposite registered instruments.

(3) In case it appears by any certificate of registration endorsed on the document, that the same or a duplicate or a copy or memorial or certificate thereof is registered in his registry office, the registrar shall also enter in the margin of every registry book wherein the same is registered opposite the entry thereof, the words, "See deposit index No. A.D.," referring to the number of the instrument in the deposit index and the date of the deposit. 50 V. c. 14, s. 5.

Notice to be sent to other registry offices where registered.

6. (1) In case it appears by any certificate of registration endorsed on the document that the same or a duplicate or copy or memorial or certificate thereof is registered in any other registry division, the registrar with whom the same is so deposited shall, within ten days after the deposit, send by post to such other registrar a notice thereof in duplicate, in the form C hereto.

(2) On receipt of the notice the registrar receiving the same shall enter in the margin of every registry book wherein the same appears to have been registered, opposite the entry thereof, the words, "See deposit index in Registry Office, No. A.D.," referring to the registry office from which the notice is received, and the number and date of the deposit therein, and he shall forthwith send by post an acknowledgment written upon one of the duplicate notices of the receipt of the notice.

(3) In case such an acknowledgment is not received within fourteen days from the sending of the notice, the registrar sending the notice shall send another like notice, and shall repeat the same every fourteen days till the acknowledgment is received.

(4) Every such notice and acknowledgment shall be post-paid and post registered, and a sufficient sum to pay the registrar's fees and the postage and post registration on the acknowledgment thereof shall be sent with the notice.

(5) All notices received from other registrars shall be filed by the registrar receiving the same in the order in which they are received, and all such acknowledgments shall be filed by the registrar receiving the same in the order of the receipt thereof. 50 V. c. 14, s. 6.

7. The registrar with whom the deposit is made, shall be entitled to the following fees to be paid at the time of the deposit by the person depositing the same, that is to say :—

On every requisition.....	20 cents.
On every document deposited therewith.	10 "
For every notice necessary to be sent to other registrars, (not more than one notice to any one registrar to be charged for).....	15 "
Necessary postage and post registration fee on the notices and acknowledgments thereof.....	

50 V. c. 14, s. 7.

8. The registrar to whom any notice under section 6 of this Act is sent, shall be entitled to a fee of twenty cents for every document, in respect of which he is to make the entries aforesaid. 50 V. c. 14, s. 8.

9. Any person shall be entitled to inspect and make or obtain copies of or extracts from any such deposited document, in like manner as in the case of instruments registered under the provisions of *The Registry Act*; and the registrar shall be entitled to the same fees in respect thereof, as in the case of registered instruments. 50 V. c. 14, s. 9.

Registrar's fees.

Fees to other registrars.

Deposited documents open to inspection. 56 V. c. 21.

Deposit not  
registration  
and not to  
affect docu-  
ment as evi-  
dence.  
56 V. c. 21.

Deposit re-  
lieves from  
liability.

Registrar  
to keep  
safely.

56 V. c. 21.

Expenses  
of executors,  
etc.

Application  
within  
5 years to  
remove  
custody.

Notice of  
application.

10. The deposit of any document under this Act, shall not be deemed a registration thereof within the meaning of *The Registry Act*; nor shall the admissibility or value of any document as evidence, be deemed to be improved or affected by the deposit. 50 V. c. 14, s. 10.

11. The deposit of a document under the provisions of this Act, shall, while the same continues so deposited, be deemed a sufficient compliance with, and fulfilment of, any covenant or agreement theretofore entered into by any person, to produce or allow the inspection of the document, or the making of any copy or extract from the same, and shall absolve any person liable for the production or custody thereof from any further liability in respect of such custody or production. 50 V. c. 14, s. 11.

12. The registrar with whom a document is so deposited shall keep the same safely in his office in like manner and with the same care as the instruments registered in his office; and he and his sureties shall be responsible in respect thereof, in like manner as in respect of instruments registered under *The Registry Act*; and the registrar shall not part with the possession of any such document, unless in accordance with the order of a Court or Judge as hereinafter provided. 50 V. c. 14, s. 12.

13. An executor or administrator of the estate of a deceased person, and a trustee of a trust estate, may reimburse himself out of such estate any expense which he incurs in or about depositing any documents which may come to his possession or control as such executor, administrator or trustee. 50 V. c. 14, s. 13.

14. (1) At any time within five years after the deposit of a document under the provisions hereof, any person may apply to the High Court of Justice, or the County Court of the county in which the deposit is made, or to a Judge of either of the said Courts, for the delivery of the document to such person, and the Court or Judge—upon being satisfied that the applicant would, but for the deposit, be solely entitled to the possession of the document, and that the deposit thereof was made without his consent, or the consent of any person entitled at the time of the deposit to any interest therein, and (in case the document relates to other lands than those in which the applicant is interested) that there are reasonably important grounds for removing the document from the custody of the registrar—may direct that the same shall be delivered up by the registrar to the applicant, or to any person the Court or Judge may direct.

(2) Before making the order, the Court or Judge may require such notice of the application as to the Court or Judge shall seem meet to be given to the person by whom the deposit was made, or to any other person, by advertisement or otherwise, or may dispense with any such notice.

(3) The order may direct that all or any part of the costs of the application, or of opposing the same, or in relation thereto, be paid by the person by whom the deposit was made, or by whom the application is made, or by any person to whom notice of the application has been given and may make such order in respect of the costs of the applicant, and of the persons who have been notified, or who may oppose the application, as to the Court or Judge seems meet. 50 V. c. 14, s. 14.

Costs.

15. (1) Upon the delivery to the registrar of the order, or a duplicate thereof, within six months after the date thereof, and upon payment to him of the sum of fifty cents, he is to deliver to the person mentioned therein the documents therein directed to be given to him, taking his receipt, or the receipt of his authorized agent therefor, and

Delivery under order.

(2) Shall make an entry in the deposit index, opposite the entry of the document, specifying the date of such delivery, and to whom delivered, the Court or Judge by whom the order was made, and the date of the order, and shall file the order among the requisitions for deposit in the order of the date of receipt thereof. 50 V. c. 14, s. 15.

Registration of order.

## SCHEDULE.

### FORM A.

(Section 4.)

To the registrar of the \_\_\_\_\_ of \_\_\_\_\_

I (or we) hereby deposit with you and require you to take into your custody, pursuant to *The Custody of Title Deeds Act*, chapter 115 of the Revised Statutes of Ontario, 1887, the following instruments and documents, viz. :—

Description of instrument or document.	Names of all parties.	Any other particulars or subject of certificate, affidavit, etc.	Lands in this registry division to which documents relate.	Particulars of registration of registered instruments.			
				Registry division.	Date.	No.	Township, city, town, etc.

Dated \_\_\_\_\_ (in duplicate)

Signed in presence of me, to whom the depositor, and his residence and occupation are well known. } (Residence) Lot Con.  
House No. or Street.  
(Occupation)

J. P. or Notary Public, or  
Mayor or Reeve, or Solicitor of Supreme  
Court, or Barrister.

The documents above mentioned, with  
a duplicate of above requisitions, are  
this day received by me.

Dated \_\_\_\_\_

Registrar for

50 V. c. 14, Sched. Form A.

### FORM B.

(Section 5.)

#### DEPOSIT INDEX.

Deposit No.	Description of instrument.	Parties.	Lands in this registry division mentioned.	Any other particulars or subject of certificates, affidavits, etc.	Particulars of registration certificate endorsed.	Date of deposit.	By whom deposited.

50 V. c. 14, Sched. Form B.

## FORM C.

(Section 6.)

## NOTICE OF DEPOSIT.

To the registrar of

The following instruments, of which the originals, or a duplicate, or memorial, or copy, or certificate, appear to be registered in your registry office, have been deposited in this registry office under *The Custody of Title Deeds Act*.

Deposit index No.	Date of deposit.	Description of instruments.	Parties.	Particulars of registration in your registry division.		
				Registration No.	Date of registration.	Township, city, town, etc.
2146	8th Aug., 1887.	Mortgage.	John Smith to Wm. Jones.			

You are required to enter such deposit, and to acknowledge receipt hereof, under above Act. Enclosed is                  cents.

Dated at

Registry Office for

Registrar.

The duplicate of above notice of deposit of (*three*) documents received at the registry office for                  this                  day of  
A.D. 18    , and entry of such deposit has been made in accordance with *The Custody of Title Deeds Act*

Registrar.

Form of acknowledgment to be put in duplicate notice.

50 V. c. 14, Sched. Form C.

By whom deposited.



53 VIC. CAP. 31.

An Act to amend The Custody of Title Deeds Act.

[Assented to 7th April, 1890.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Registra-  
tion of  
receipts.

Rev. Stat.  
c. 115.

Registrar  
to receive  
and enter  
receipts.

1. A receipt for payment of money made on any registered mortgage, bond, agreement, lease or any other registered instrument, may be deposited in the registry office in which the original instrument is registered under the provisions of *The Custody of Title Deeds Act*, but it shall not be necessary to deliver any requisition with the receipt, or to pay any fee for depositing the same or the entries in respect thereof, except the sum of twenty cents.

2. The registrar shall receive and file in numerical order all receipts tendered for filing under this Act, and shall endorse thereon the number, the date of filing, and the amount contained in the receipt, and shall write in the margin of the registry book wherein the instrument to which the receipt relates has been registered the words "See receipt No.     ."

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s Act.

, 1890.

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## 56 VIC. CHAPTER 21.

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## 56 VIC. CHAPTER 21.

### An Act respecting the Registration of Instruments relating to Lands.

[Assented to 27th May, 1893.]

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| <p>SHORT TITLE, s. 1.<br/>INTERPRETATION, s. 2.<br/>REGISTRY OFFICES, ss. 3-9.<br/>REGISTRARS AND DEPUTIES :<br/>    APPOINTMENT, SECURITY OF, ETC.,<br/>        ss. 10-23.<br/>    DUTIES, ss. 24-28.<br/>BOOKS OF OFFICE—<br/>    TO BE FURNISHED BY COUNTY, ss.<br/>        29-31.<br/>    TRANSFER OF, UPON ALTERATION IN<br/>        LIMITS OF THE REGISTRY DIVISION<br/>        OR REMOVAL OF REGISTRAR, ss.<br/>        32-34.<br/>    COPIES OF, WHEN TOO OLD FOR USE,<br/>        s. 35.<br/>ABSTRACT INDEX, s. 36.<br/>ALPHABETICAL INDEX, s. 37.<br/>INSTRUMENTS THAT MAY BE REGIS-<br/>    TERED, ss. 38, 39.<br/>PROOF FOR REGISTRATION, ss. 40-60.<br/>MANNER OF REGISTERING, ss. 61-67.<br/>REGISTRATION OF—<br/>    CROWN GRANTS, s. 68.<br/>    ORDERS IN COUNCIL, s. 69.<br/>    WILLS, ss. 70-71.<br/>    OTHER INSTRUMENTS, s. 72.<br/>    INSTRUMENTS EXECUTED BEFORE 1st<br/>        JAN. 1866, ss. 73-74.<br/>REGISTRATION OF INSTRUMENTS IN<br/>    FULL WHEN MEMORIALS PREVI-<br/>        OUSLY REGISTERED, s. 75.<br/>DISCHARGES OF MORTGAGES, ss. 76-81.</p> | <p>DISCHARGE OF LIEN NOTES, s. 82.<br/>BY-LAWS, ETC., s. 83.<br/>EFFECT OF REGISTERING OR OMITTING<br/>    TO REGISTER, ss. 84-93.<br/>UNREGISTERED INSTRUMENTS AFTER<br/>    GRANT FROM THE CROWN VOID<br/>    AGAINST SUBSEQUENT REGISTERED<br/>    PURCHASER, s. 84.<br/>POWERS OF ATTORNEY, s. 85.<br/>WILLS TO BE REGISTERED WITHIN<br/>    TWELVE MONTHS AFTER DEATH,<br/>    s. 86.<br/>DEEDS ON SALES FOR TAXES, ss. 87,<br/>    88.<br/>REGISTRATION AS NOTICE, ss. 89-91.<br/>UNAUTHORIZED ALTERATIONS IN<br/>    ENTRIES, ss. 92, 93.<br/>ACTUAL NOTICE, s. 94.<br/>EQUITABLE LIENS INVALID AS<br/>    AGAINST REGISTERED INSTRU-<br/>    MENTS, s. 95.<br/>TACKING NOT ALLOWED AS AGAINST<br/>    REGISTERED INSTRUMENTS, s. 95.<br/>REGISTRATION OF PLANS, ss. 94-104.<br/>PROVISIONS FOR RE-REGISTRATION IN<br/>    CASE OF LOSS, ETC., OF REGISTRY<br/>    BOOKS, s. 105.<br/>DEFECTS IN REGISTRATION, ss. 106-<br/>    109.<br/>LIST OF PATENTS TO BE FURNISHED<br/>    TO REGISTRAR, s. 110.<br/>FEES OF REGISTRARS, ss. 111-127.<br/>INSPECTOR OF REGISTRY OFFICES, ss.<br/>    128, 131.</p> |
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HER MAJESTY, by and with the advice and consent of  
the Legislative Assembly of the Province of Ontario,  
enacts as follows :—

Short title. 1. This Act may be cited as "*The Registry Act, 1887*,"  
R. S. O. 1887, c. 114, s. 1.

*Origin and growth of Registry Act:*—The first Registry Act passed in Upper Canada was 35 Geo. III. c. 5, enacted in 1795. This was based upon the Yorkshire and Middlesex Registry Acts. Various amendments were from time to time passed (*a*); but the system now in use was really introduced in 1865, when a radical change was made in the method of registry, by substituting registration in full for registration by memorial (*b*). The Act of 1865 was embodied in the Registry Act of 1868 (*c*), which in turn, with its numerous amendments, has passed through three consolidations of which the present Act, 56 V. c. 21, is the last (*d*). Two amendments of the last session, 57 V. cc. 34 & 35, as well as R. S. O. 1887, c. 115 (*e*), are to be read with the main Act, 56 V. c. 21.

Interpretation.

2. Where the following words occur in this Act, or in the schedules thereto, they shall be construed in the manner herein after mentioned, unless a contrary intention appears:—

"Instrument."

(1) "Instrument" shall include every Crown grant, Order in Council of the Dominion or of this Province, deed, conveyance, mortgage, assignment of mortgage, certificate of discharge of mortgage, assurance, lease, bond, release, discharge, power of attorney, or substitution thereof, under which any such deed, conveyance, assurance, discharge of mortgage or other instrument is executed, bonds or agreements for sale or purchase of

(*a*) See 37 Geo. III. c. 8; 39 Geo. III. c. 4; 56 Geo. III. c. 16; 58 Geo. III. c. 8; 6 Geo. IV. c. 7, ss. 19, 20; 10 Geo. IV. c. 8; 3 Wm. IV. c. 14; 4 Wm. IV. c. 1, s. 47; 4 Wm. IV. c. 16; 9 V. c. 34; 10-11 V. c. 16; 11-12 V. c. 16; 12 V. c. 35; 13-14 V. cc. 53, 63, 65; 14-15 V. c. 59; 16 V. cc. 182, 187; 18 V. c. 127; 19 V. c. 43, s. 15; 19 V. c. 90; 20 V. c. 36; 20 V. c. 57, s. 20; 22 V. c. 33, s. 17; 22 V. cc. 42, 95, 99; C. S. U. C. c. 89; 24 V. cc. 21, 41, 42; 25 V. c. 21.

(*b*) 29 V. c. 24, registration in full taking effect on and after 1st January, 1866. See also 29-30 V. c. 43.

(*c*) 31 V. c. 20.

(*d*) See 32 V. c. 9; 34 V. cc. 14, 24, 25, 26; 35 V. cc. 27, 28, 29; 36 V. cc. 6, 17, 18, 48; 37 V. c. 7; 38 V. c. 17; 39 V. cc. 7, 17, 25; 40 V. c. 7, Sched. A.; 40 V. c. 8; R. S. O. 1877, cc. 40, 111; 42 V. c. 20; 43 V. c. 24; 44 V. c. 10; 48 V. cc. 2, 16, 23; 49 V. cc. 16, 24; 50 V. cc. 7, 8; 51 V. c. 17; 52 V. c. 19; 54 V. c. 18; 55 V. cc. 17, 21, 22; 56 V. c. 5.

(*e*) Amended by 53 V. c. 31.

land, letter of attorney, will, probate of will, grant of administration, municipal road by-law, certificate of any proceedings in any Court, judgment of foreclosure, and every other certificate or judgment of any Court affecting any interest in or title to land; also, certificates of payment of taxes granted under the corporate seal of the county, city, or town by the treasurer; every sheriff's and treasurer's deed of lands sold by virtue of his office; every contract in writing; every commission and proceeding in lunacy, bankruptcy and insolvency; and every other instrument whereby lands or real estate may be transferred, disposed of, charged, incumbered or affected in any wise, affecting land in Ontario.

(2) "Land" shall include lands, tenements, hereditaments, appurtenances and real estate. "Land."

(3) "Will" shall include probate of will, and exemplification, or notarial copies of probate of will and letters of administration with the will annexed, and any devise whereby lands are disposed of or affected. "Will."

(4) "County" shall include a union of counties, a city, junior county and any part of a county or counties set apart for judicial or registration purposes. R. S. O. 1887, c. 114, s. 2. "County."

*Crown Grant*:—See section 68 *infra*, for mode of registering Crown Grants. By section 110 *infra*, a list of Crown grants is to be furnished quarterly to the registrars; a provision which was introduced in 1865 (*f*).

*Order in council*:—See section 69 *infra*, for mode of registering Orders in Council. See R. S. O. 1887, c. 59, (administration by the Crown of estates of intestates) s. 5, for sale of land in accordance with Order in Council (*g*). For evidence of Orders in Council, see R. S. O. 1887, c. 61, ss. 21, 22.

*Deed, conveyance*:—See pp. 11, 12 *supra*.

*Mortgage*:—See p. 8, *supra*.

*Assignment of mortgage*:—Where there was first a mortgage registered, then an attachment, then an assign-

(f) 29 V. c. 24.

(g) Cf. R. S. C. c. 117; 5<sup>th</sup> V. c. 36.

ment of the mortgage, the assignee was held to have priority (*h*).

*Certificate of discharge*:—See under section 76, *infra*.

*Assurance*:—See p. 11, *supra*.

*Lease*:—See under section 39, *infra*.

*Bond*:—See “bonds or agreements,” *infra*.

*Release*:—See “certificate of discharge,” *supra*; also pp. 100 *et seq.*

*Discharge*:—See “certificate of discharge,” *supra*.

*Power of attorney*:—See section 85 as to power of attorney (with commission); sections 55 *et seq.*, as to registration of powers of attorney, and copies thereof as evidence; cf. R. S. O. 1887, c. 97, (An Act respecting Powers of Attorney) for powers exercisable after death of constituent.

*Bonds or agreements*:—Instrument includes “bonds or agreements for sale or purchase of land,” and is therefor wider than the scope of the word assurance in the Yorkshire Registries Act, 1884 (*i*). The registry of an agreement to convey land gives priority over subsequent conveyances (*j*).

*Letter of attorney*:—See “Power of Attorney,” *supra*.

*Will, probate of will, grant of administration*:—See sections 70 *et seq.* as to mode of registering; section 86 as to effect of non-registering.

*Municipal road by-law*:—See section 83 as to registration of by-laws.

*Certificate of proceedings in court*:—See sections 51 *et seq.*

*Judgment*:—See section 54.

(*h*) *Raymond v. Richards*, Russ. Eq. Dec. 423.

(*i*) See *Rodger v. Harrison*, 1893, 4 R. 171; 1 Q. B. 161.

(*j*) See *Thompson v. Simpson*, 1 Dr. & War. 459 (1841).



*Certificate of payment of taxes*:—See “Consolidated Assessment Act, 1892,” section 151.

*Sheriff's and treasurer's deed*:—See sections 87 and 88 *infra*.

*“Every contract in writing”*:—The writing may be print or lithograph (*k*).

*“Commission and proceeding in lunacy,” etc.*:—See R. S. O. 1887, c. 54 (Lunatics); R. S. O. 1887, c. 124, (Insolvents).

*Every other instrument—Notice of sale under power*:—See 57 V. c. 35 *infra*.

*“Affecting land in Ontario”*:—In the case of *Ontario Industrial Loan Co. v. Lindsay* (*l*), the following document was registered:—“Know all men by these presents that I, G. S., of the City of Toronto, do hereby declare that I claim the lands and premises known and described as follows:” Of this remarkable instrument, Hagarty, C.J., said:—“I think it clear that the registry laws do not permit such a document, as the defendants S. and C. prepared, to be recorded. In the sense of ‘affecting’ the lands I think we must hold that the instrument must have some bearing on the title, professing to convey, charge or affect it by its own operation; that an assertion that some one else claims to have an interest, or that the registered title of some other person is defective, does not come within the statute, in the words of the 2nd section; (R. S. O. c. 111) of the Act, ‘every other instrument whereby lands or real estate may be transferred, disposed of, charged, incumbered, or affected in any wise in law or in equity’ besides the specially described instruments set out in the sections.”

(*k*) See *Queen v. Registrar of Middlesex*, 7 Q. B. 156 (1845).

(*l*) 3 O. R. 75 (1883). Cameron, J., dissenting and not considering such a document a cloud upon the title.

*"Lands"*—*Standing timber within the registry laws*:—  
Growing timber is included in the definition of lands here given; that is, unless there has been a binding sale (prior to the particular conveyances in dispute in any case), alienating the trees and severing the property in them from the realty of which they had up to that time formed a part (*m*).

*Proceeds of real estate devised for sale*:—*Cf. Arden v Arden* (*n*).

*Whether description must identify particular lands*:—  
A point of much practical importance is whether an instrument, to obtain the benefit of the Act, must contain a particular description by which the lands affected may be identified. This point has been raised more than once, as in *Russell v. Russell*, where we find Spragge, C., saying:—

"This settlement, however, does not specify the land in question, but conveys to the intended wife any (meaning, no doubt, all) of the estate, personal or real, of the intended husband, and it is made a question whether the grantee could register this conveyance. If she could, the registration would afford her all reasonable protection. If she could not, she would be less secure, as there would be danger of the purchaser at sheriff's sale registering the sheriff's deed, and thereby cutting out her rights under the settlement, *Waters v. Shade* (*o*). I do not know that there is any decision upon the point. The language of the Registration Act certainly points to there being a description of particular land in the instrument to be registered" (*p*).

(*m*) *Ferguson v. Hill*, 11 U. C. R. 533 (1854), following *Ellis v. Grubb*, 30 S. 611. *Cf. Short v. Ruttan*, 12 U. C. R. 79 (1854); *McLean v. Burton*, 24 Gr. 134 (1876); *McMillan v. Miller*, 7 U. C. R. 544.

(*n*) 20 Ch. D. 702 (1885), case under Middlesex Act, held no priority gained by registration of mortgage of share in proceeds of land devised for sale. *Cf. Heimand v. More*, 1 Eden 327.

(*o*) 2 Gr. 457.

(*p*) *Russell v. Russell*, 28 Gr. 422 (1881). *Cf. Reg. v. Middlesex*, 15 Q. B. 976.

The same point is more definitely considered in a recent case, where Street, J., says:—

“The Registry Act, excepting in one instance, provides for the registration of all instruments affecting the lands, however wide or general may be the description of the lands intended to be affected. Those instruments containing a description so general that the lands affected cannot be identified are to be registered in a book kept for that particular purpose; but the effect given to a registered instrument containing a general description differs in no wise from that given to one containing a particular description: the registration of both classes of instruments operates as notice to the world of their existence” (q).

*When improper description will prevent registration:—*“The one and only case in which a registrar is forbidden to register a conveyance by reason of the description of lands contained in it, is that of a conveyance made after the registration of the plan of a subdivision, where the conveyance does not conform and refer to the plan” (r).

With section 2 should be read section 38:—“Subject to the provisions of the next section, all instruments mentioned in section 2 of this Act may be registered.”

#### REGISTRY OFFICES.

3. The Registry Divisions at present existing are hereby continued; and whenever any county is separated for judicial purposes from a union of counties, or a new county is formed and set apart for judicial purposes, there shall be a separate Registry Office established therein by the Lieutenant-Governor in Council, which office shall be kept in the county town in like manner as in other county towns. R. S. O. 1887, c. 114, s. 3.

Registry  
Divisions.

(q) *Israel v. Leith*, 20 O. R. 369 (1890).

(r) *Ib.* referring to R. S. O. 1887, c. 114, s. 84 (2), now 56 Vic. c. 21, s. 96 (3).

*Books that go with new Registry Office:—See section 32 infra.*

*Liability of counties on separation:—*Where a registrar had rendered services to two counties before their separation, for which he was entitled to be paid, it was disputed which county was liable, and they were held jointly liable (s).

Registry divisions in Toronto.

4. There shall be separate registry divisions for the city of Toronto, to be called respectively East and West Toronto.

Registry office in Toronto.

5. The registry building now on Richmond Street West in the city of Toronto, shall be and continue to be the offices of the registry divisions of East and West Toronto. The former registrar of the city of Toronto shall, during pleasure and without new appointment, be registrar for the registry division of West Toronto. 52 V. c. 19, s. 8.

Construction of offices under Rev. Stat. c. 114 and 116.

6. The council of the city of Toronto shall, by additions thereto to be approved by the Lieutenant-Governor in Council, provide in or in connection with the present registry building, or otherwise, sufficient safe and proper fire-proof offices and vaults for the registry offices for both divisions of East and West Toronto, and for the office of land titles for the said city, and shall furnish the same in accordance with the provisions of this Act and *The Land Titles Act* respectively. 52 V. c. 19, s. 10; 53 V. c. 30, s. 10.

Rev. Stat. c. 116.

Delivery of registry books, etc., to registrar of East Toronto.

7. (1) The registry books, and all books of indexes, which have been kept exclusively for such part of the city of Toronto, hereby set apart as the registry division of East Toronto, and likewise all original memorials, all original duplicates, and all deeds, conveyances and wills, and all other instruments, and all maps or plans lodged according to law in his office, and relating exclusively to lands within the division of East Toronto, shall remain in the custody of the registrar of East Toronto.

(2) All other abstracts index books and registry books original memorials and original duplicates, and all deeds, conveyances and wills, and all other instruments and maps or plans, affecting lands in both registry divisions, shall remain and continue with the registrar of the registry division of West Toronto.

(s) *Campbell v. Corporation of York and Peel*, 26 U. C. R. 635; 27 U. C. R. 138 (1867).

(3) All wills and instruments in which there is a general devise, conveyance or power affecting lands in the city of Toronto, without local description, shall be registered in the registry division of West Toronto.

(4) The registrar of the registry division of West Toronto is hereby authorized and empowered to certify to all abstracts of title and copies of instruments from such books retained in his office, and affecting lands in the registry division of East Toronto, and he is to permit searches to be made therefrom, whenever required so to do, upon being paid the ordinary fees.

(5) The present senior deputy registrar shall be the abstract clerk of the two divisions, during the pleasure of the Lieutenant-Governor, and shall perform such other duties as the Lieutenant-Governor may direct. His salary shall be paid by the two registrars, one-half each, or in such other proportions as the Lieutenant-Governor may from time to time direct.

(6) The Master of Titles is to be at liberty to inspect, by himself or his clerks, all books and papers in the said offices for his own information as such Master, without payment of fees, subject to any general rules to be made under the authority of *The Land Titles Act*. 52 V. c. 19, s. 11.

Rev. Stat.  
c. 116.

*Registry Offices in Toronto*:—The division of the offices in Toronto has tended to make searches more expensive. Thus if one searched an abstract index and four numbers in the old office he paid twenty-five cents. If now he search the abstract index in the East, and find his four numbers stored in the Western Division, he pays twenty-five cents for the abstract in the East and five cents apiece for the four numbers in the West,—a possible difference of twenty cents. The result is that now one sometimes makes one search and pays for two, where formerly it was not impossible to make two searches and pay for one.

8. Where the Registry Office in any division appears to the Lieutenant-Governor in Council to be inconveniently situated, he may by proclamation order the same to be removed to any other place in the division. R. S. O. 1887, c. 114, s. 4.

Registry  
office may  
be removed.

*Removal of registry office*:—See *Frazer v. Municipality of Stormont (t)*.

(t) 10 U. C. R. 86 (1853).

County  
Councils to  
provide fire-  
proof offices  
and vaults.

9. For the safe-keeping and protection of all books, memorials, duplicates, and other instruments of whatever description, and plans, belonging to the office of Registrar, the council of every county where, at any time there are no safe and proper fire-proof offices and vaults provided by the council, or where hereafter any Registry Office is established, shall provide, furnish and maintain, and keep in good repair, a safe and fire-proof Registry Office, fire-proof vaulted, upon a plan and on a site to be approved by the Lieutenant-Governor in Council; and the said council shall keep the said Registry Office furnished with fuel and furniture and in good repair, and towns separated from counties for municipal purposes, and cities in which no separate Registry Offices exist, shall bear a ratable proportion of the expense thereof, based on the assessment of all the municipalities within the jurisdiction of the county. R. S. O. 1887, c. 114, s. 5.

*Duty of county council, how enforced:*—A mandamus will lie to compel a county council to comply with the provisions of the present section (*u*). While the registrar may with the aid of the courts, compel the compliance of the county council, he cannot, when he provides an office himself, in case of the council's neglect, make the council chargeable with rent (*v*).

For dispute between county and city as to expenses of fitting up registry office, see *Municipality of York v. Mayor of Fredericton* (*w*).

Registrar.

10. Every Registry Office shall be kept by an officer to be called the Registrar. R. S. O. 1887, c. 114, s. 6.

Regis-  
trars, how  
appointed,  
etc.

11. The Lieutenant-Governor shall, as occasion may require from time to time, by commission, under the Great Seal of the Province, appoint a fit person to the office of Registrar, and shall, in like manner, fill up any vacancy occurring by the death, resignation, removal or forfeiture of office by any Registrar, and every Registrar heretofore appointed or hereafter to be appointed shall hold office during pleasure only. R. S. O. 1887, c. 114, s. 7.

(*u*) See *Regina v. Northumberland and Durham*, 10 U. C. C. P. 526 (1861).

(*v*) *Ward v. Northumberland and Durham*, 12 U. C. C. P. 54 (1862). See further *Frazer v. Municipality of Stormont*, 10 U. C. R. 86 (1853).

(*w*) 29 N. B. R. 662 (1884).

"*During pleasure only*":—A question was raised in *Hammond v. McLay* (y) whether the appointment of a registrar "during pleasure" and his subsequent removal were valid. And it was urged that an incumbent could be removed only for the reasons and in the manner pointed out by the Statute. The present section makes an incumbent "hold office during pleasure only."

12. The Lieutenant-Governor may from time to time by Order in Council fix and determine the amount of the security to be given, as hereinafter mentioned, by each Registrar; but the amount of such security shall be not less than \$4,000, nor more than \$10,000. R. S. O. 1887, c. 114, s. 8.

Amount  
of security  
to be given.

[*As to security of Registrars in the Unorganized Districts. See R. S. O. c. 91, s. 36.*]

13. (1) Subject to the provisions of section 24 of *The Act respecting Public Officers*, before any Registrar is sworn into office, he shall execute and enter into a joint and several covenant in duplicate with two or more sufficient sureties to be approved by the Lieutenant-Governor in Council for such amounts as may be fixed and determined by Order in Council in that behalf, as aforesaid.

Security  
to be given  
by Regis-  
trars.

Rev. Stat.  
c. 15.

(2) Such covenant may be in the form of Schedule A to this Act, or to the like effect; and to each of such covenants shall be attached an affidavit in the form of Schedule B to this Act, or to the like effect, made by each of the sureties therein mentioned.

(3) One of the duplicates with the affidavits appended shall be forthwith transmitted to the Provincial Secretary, to be by him retained, and the other duplicate with the affidavits aforesaid, shall be by the Registrar forthwith filed in the office of the Clerk of the Peace for the said county or union of counties where the same shall remain of record. R. S. O. 1887, c. 114, s. 9.

*The bond under this section does not secure municipality:*—"The result seems to be that the bond given under section 9 must be taken to be restricted to the performance by the Registrar of the duties imposed upon him, other than the duty of paying over to the municipi-

(y) 26 U. C. R. 434; 28 U. C. R. 463 (1869).



pality the prescribed portion of his fees; and that if an interested municipality should desire to have security for the moneys payable to it by the Registrar, it must obtain a special bond for the purpose" (z).

New covenants may be required by Inspector.

14. Any Registrar, whether appointed before or after the passing of this Act, may at any time be required by the Inspector of Registry Offices, with the approval of the Lieutenant-Governor in Council, to execute new covenants in the form and to the effect hereinbefore provided, or to furnish other sureties as may be deemed expedient, or both, and in default thereof shall be subject to the penalties mentioned in section 25 of this Act. R. S. O. 1887, c. 114, s. 10.

Copies may be obtained by any person.

15. Any person may examine and obtain a copy of the Registrar's covenant and affidavits on payment to the Clerk of the Peace of a fee for the copy and search, of one dollar, or for the search, of twenty-five cents. R. S. O. 1887, c. 114, s. 11.

Rev. Stat. c. 15, ss. 15-20 to apply to securities.

16. Sections 15 to 20 inclusive of *The Act respecting Public Officers*, shall apply to securities given by Registrars. R. S. O. 1887, c. 114, s. 12. See also R. S. O. c. 15, ss. 24-27.

Lieutenant-Governor may require Registrars to give security.

17. The Lieutenant-Governor, upon the application of any county or city interested, or without such application if he thinks fit, may require any Registrar to give security in such form and for such an amount as the Lieutenant-Governor in Council determines to be sufficient to secure the due payment of any moneys payable by the Registrar to the county or city. R. S. O. 1887, c. 114, s. 13.

Sureties of Registrars.

18. (1) A surety for a Registrar who is no longer disposed to continue his responsibility, may give notice thereof to the Registrar and to the Provincial Secretary, and in such case the Registrar shall, under penalty of forfeiture of his office, furnish a new surety in lieu of the surety so giving notice, and shall complete and transmit the necessary covenant in that behalf to the Provincial Secretary within one month after the notice, and shall procure the approval of the new security within two months after the notice.

(2) All accruing responsibility on the part of the person giving the notice shall continue until the perfecting and approval of the new security, and shall thereupon cease. R. S. O. 1887, c. 114, s. 14.

(z) Street, J., in *County of Middlesex v. Smallman*, 19 O. R. 351 (1890).

19. The Registrar and his sureties shall be jointly and severally liable on their covenant to any aggrieved person or persons to indemnify him or them against any damage or loss sustained by him or them, by or through the neglect or misconduct of the Registrar or his deputy in the performance of the duties of his office, not exceeding the penalty named therein, but this provision shall not exempt the Registrar from any further responsibility to persons sustaining damage or loss as aforesaid. R. S. O. 1887, c. 114, s. 15.

Liability  
of Regis-  
trars and  
their sure-  
ties.

*Liability of sureties*:—The law enunciated by section 19 seems to be similar to that followed in some of the American courts, and thus expressed by *Throop (a)*:—"The sureties of a registrar of deeds, county clerk, prothonotary, or other officer having charge of public records, are liable to the person injured, for a false statement in a certificate given by the officer, upon the requisition of such person, respecting the existence or non-existence of records of conveyances, judgments or other liens, affecting property which is the subject of inquiry; or the contents of such records (b). And it seems to be immaterial whether there is any proof of payment of the officers' fees (c). So where the clerk is required by statute to note in the margin of the record of a mortgage, the payment and cancelment of the mortgage, if he falsely makes such a note his sureties are liable to a purchaser for the amount necessarily paid to relieve the property from the incumbrance (d). But one who fails to make the proper inquiries, from the clerk or the vendor, cannot recover" (e).

"*Any further responsibility*":—"The covenants of the defendant given under the Act do not in any way inter-

(a) *Treatise on the Law relating to Public Officers* (1892), s. 248.

(b) Citing *Fox v. Tabault*, 33 La. Ann. 32; *Smith v. Holmes*, 54 Mich. 104; *McCaraher v. Comm.*, 5 Watts & S. (Pa.) 21; *Ziegler v. Comm.*, 12 Pa. St. 227. "But he is liable for such negligence only to the person for whom the search was made," *Day v. Reynolds*, 23 Hun. (N.Y.) 131; *Savings Bank v. Ward*, 100 U. S. 195.

(c) Citing *Ziegler v. Comm.*, 12 Pa. St. 227.

(d) Citing *Appleby v. State*, 45 N. J. L. 161. See *State v. Davis*, 96 Ind. 539, 117 Ind. 307, where damages nominal only.

(e) Citing *Crews v. Taylor*, 56 Tex. 461.

fere with the right of any party aggrieved to maintain an action against him for any neglect of his duty" (f).

Registrar's  
oath of  
office.

20. Every Registrar, before he enters upon the execution of his office shall, before two or more Justices of the Peace for the county, take the oath given in the form of Schedule C. to this Act, which shall be transmitted to the Provincial Secretary, together with the recognizance and covenant aforesaid. R. S. O. 1887, c. 114, s. 16.

Appointment  
of  
Deputies.

21. The Registrar may by writing under his hand and his seal of office, nominate a deputy or deputies in his office, who may perform all the duties required under this Act, in the same manner and to the like effect as if done by the Registrar; and any Registrar may remove his deputy and appoint another in his place whenever he thinks it necessary; and in case of the death, resignation, removal or forfeiture of office of the Registrar, the Deputy Registrar, or in case of there being more than one, the senior Deputy Registrar, shall do and perform all and every act, matter, and thing necessary for the due execution of the said office, until a new appointment of Registrar is made by the Lieutenant-Governor. R. S. O. 1887, c. 114, s. 17.

Removal.

Power of  
Deputy in  
case of death  
or removal  
of Registrar.

Deputy's  
oath of  
office.

22. Every Deputy Registrar before he enters on the execution of his office, shall, before two or more Justices of the Peace for the county take the oath appointed to be taken by the Registrar, or an oath to the like effect, which oath shall be forthwith transmitted to the Provincial Secretary. R. S. O. 1887, c. 114, s. 18.

Registrars  
or Deputies,  
etc., not to  
act as agents  
for persons  
taking securities on real  
estate, or  
advise as to  
titles, etc.,  
in their  
Counties.

23. (1) No Registrar or Deputy Registrar or clerk in his office shall, directly or indirectly, act as the agent of any corporation, society, company, person or persons investing money and taking securities on real estate within his county, nor shall the Registrar or Deputy Registrar, or clerk in the office advise, for fee or other reward, or otherwise, upon titles of land, or practise as a conveyancer, within his county, nor shall he carry on or transact within the Registry Office, any other business or occupation whatever, upon pain of forfeiture of office. R. S. O. 1887, c. 114, s. 19.

Registrars  
not to  
engage in  
certain call-  
ings.

(2) No Registrar hereafter appointed shall practice for gain as a barrister, solicitor, physician or surgeon; nor shall any Registrar heretofore appointed, where the net income from his office is more than \$1,000, nor shall any Deputy Registrar or clerk in the office of the Registrar, carry on a practice as a

(f) Cameron, J., in *Bruce v. McLay*, 3 O. R. 23 (1883). See notes to s. 25 *infra*.

physician or surgeon during office hours other than a consulting practice, or out of office hours other than a consulting or office practice at his home, nor take any proceeding under the power of sale in any mortgage or other instrument affecting land either as solicitor or agent, nor shall he personally or as a member of a firm carry on a loaning business or be in any way connected with any firm having business to transact in the office of such Registrar.

(3) The work of the registry office shall be conducted and carried on in all cases under the direction and immediate supervision of the Registrar, whether heretofore or hereafter appointed.

Work in registry office to be personally conducted by registrar.

*Deputy registrar acting as conveyancer*:—Where a deputy registrar had done business for many years as a conveyancer, for his own benefit with the knowledge and without the objection of the registrar, it was held that the registrar could not afterwards claim the profits. The same case also revealed that the deputy had neglected to give credit for some of the searches made by him in his capacity as conveyancer (*g*). As others besides the registrar (*i.e.* the municipality and Province) are now interested in the payment of full fees for searches, the employment of a practising conveyancer as a registrar or deputy would be obviously improper; hence this section.

#### DUTIES OF REGISTRARS.

24 Every Registrar shall reside within ten miles of his office, and shall keep his office at the place named in his commission or otherwise as appointed by the Lieutenant-Governor in Council, or by any Act in force respecting the same. R. S. O. 1887, c. 114, s. 20.

Residence of registrars.

25. If the Registrar in any manner misconducts himself in his office or neglects to perform his duty in every respect as required of him by this Act, or commits or suffers to be committed any undue or fraudulent practice in the execution thereof, then the Registrar may, at the discretion of the Lieutenant-Governor in Council, be dismissed, and he shall, moreover, together with his sureties, so far as their covenants extend, be

Removal for misconduct.

Liability of Registrar.

(*g*) *Smith v. Redford*, 19 Gr. 274 (1872).

Deputy  
executing  
office.

liable to pay all damages, with full costs of suit, to any person injured thereby, to be recovered by action in the High Court; and any deputy executing the office of Registrar during any vacancy by death, resignation, or forfeiture of the Registrar, shall, together with the sureties of the Registrar as far as their covenants extend, be for the same cause, and in like manner liable as the Registrar and his sureties are in this section declared to be liable. R. S. O. 1887, c. 114, s. 21.

*Case of improper registry, liability of registrar:—*A case where a registrar had improperly, but in good faith, registered an instrument not within the Act, gave occasion to Chief Justice Hagarty, to consider the liability of registrars in cases of this sort; he says:

"I do not consider that the registrar was a necessary party to this suit. The registration of this decree would be sufficient for the removal of the alleged cloud upon the title, but we have also to consider whether he is a proper party.

"The learned Judge has, I think, stated too broadly the rule as to a registrar's liability. He may be liable for acts done or omitted in the execution of his office, although such act or omission did not require the allegation or proof that it was done 'maliciously and without reasonable or probable cause.'

"He is liable for acts or omissions causing damage although arising wholly from negligence or mistake.

"Proudfoot, J., has dismissed the Bill as against the registrar and directed the plaintiffs to pay his costs. I am reluctant to interfere in a matter merely as to costs, but I am compelled to review this decision. It appears to me that the plaintiffs had the right to make the registrar a party, although they were not bound so to do. They complain of a wrong being done and prove its being done by the three defendants. The law seems clear that all concerned in the commission of an actionable wrong may be proceeded against as principals. I may refer to such cases as *Crunch*

v. *White*, 1 Bing. N. C. 414; *Davies v. Vernon*, 6 Q. B. 448; *Broom on Parties*, 258.

"I have no doubt as to the registrar having acted in good faith to the best of his judgment. He erroneously, as we hold, placed this document on the records, and it seems to me that we cannot deny the plaintiff's right to proceed against him as well as the other defendants. We treat it as a wrong done to plaintiffs in placing an improper document on record against this property; and all concerned in placing it there may be treated as principals. In this view I do not see how plaintiffs can be directed to pay the registrar's costs, though we should not interfere with the learned Judge's discretion in refraining to give costs against him (*h*).

In the same case, and touching the same topic, we have also the following judgment by Armour, J.:—"I think all the defendants were properly made parties to this action. If the registrar wrongly obliterates from the register a part of my title to a lot of land, surely an action will be against him for the removal of the cloud he has thus placed upon my title, and for a proper declaration which will supply the place of the obliteration. If others assist him in doing a like wrong, or he assist others in doing it, surely the action will lie against all of them; they are all equally wrong-doers. If the registrar, of his own motion, wrongly places something upon the register against my title to a lot of land which he has no right to place there, surely an action will lie against him for the cloud he has thus placed upon my title, and for a proper declaration doing away with the effect of such wrongful act. If others assist him in doing a like wrong, or if he assist others in doing it, surely the action will lie against them all, they are all equally wrong-doers" (*i*).

(*h*) *Ontario Industrial Loan Co. v. Lindsay*, 3 O. R. 75 (1883).

(*i*) *Ib.* at p. 66.

*Liability of registrar for omission to make entry in abstract index* :—"There is no doubt the defendant made a slip in not entering an abstract of the will in the abstract index, and would be liable to any one suffering damage in consequence of such omission" (j).

*Registrar's liability is to those who pay him fees* :—The most cogent evidence of privity with the registrar so as to fix him with liability for neglect, is to prove that the party complaining of the neglect has paid fees to the registrar. "The registrar is entitled to be paid by every person making a search, and the duty of keeping his books correctly is, while in one sense a public duty, for the benefit of those who make searches and pay fees for so doing; and liability for breach of such duty must be confined to those directly injured. Were it otherwise, when would the liability cease?" (k).

*Quære as to rights of person in privity with payer of fees* :—"In adopting this language in reference to this case it is not necessary to say what the effect of a registrar giving a certificate of the registration respecting a particular lot, would be upon his liability to a third person dealing with the person to whom the certificate was granted upon the faith of it, and suffering loss in consequence of an error therein" (l).

*Measure of damages* :—A registrar, in giving the plaintiff a certificate of entries on a lot, omitted to mention a mortgage for \$600 prior to the one which the plaintiff purchased (as a first mortgage). The first mortgagee sold, and the plaintiff purchased at less than the amount of the two mortgages; afterwards selling at a considerable advance

(j) Cameron, C.J., in *Green v. Ponton*, 8 O. R. 473 (1884), where however the evidence shewed the plaintiff bought in the belief that the mortgagor had title by possession. Cf. *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257.

(k) *Ib.* at p. 474, following *Pennsylvania v. Harnier*, 1 Local Courts Gazette, 108. Cf. *State v. Harris*, 89 Ind. 363; *Harrington v. Ward*, 9 Mass. 151; *Buller v. Kent*, 19 Johns. (N.Y.) 223.

(l) *Ib.* at p. 475; cf. *Throop on Public Officers*, section 742.



and realizing a profit on the whole transaction. A jury awarded him \$500 damages against the registrar, and the Court held the amount reasonable, as the plaintiff had suffered damage just to the extent of the prior mortgage (*m*). But where a purchaser had notice of the omitted mortgage it was held that he could not make any claim against the registrar in respect of payments made by the purchaser after such notice; and the registrar who, on finding his mistake, had bought up the outstanding mortgage was held entitled to foreclose the same (*n*).

*Similarity of liability of registrar with that of agent for investment*:—In Sedgwick on Damages (*o*) the above cited case of *Harrison v. Brega* is one of the authorities relied upon for fixing the liability of an agent for investment who fails to find an incumbrance; and there seems every reason to believe that a registrar making a similar default should incur a similar liability. The rule in Sedgwick is thus stated: "An agent to invest money in a mortgage, who fails to find a prior incumbrance which is on the land is liable for the loss that results. If the principal discovers and removes the prior incumbrance, the measure of damage is the amount paid to remove the incumbrance (*p*), even though part of the land covered by the mortgage was not subject to the prior incumbrance (*q*). But if the principal does not discover the existence of the prior incumbrance until the land is sold to satisfy it and lost to him, the measure of his damages is the amount of his loan" (*r*).

(*m*) *Harrison v. Brega*, 20 U. C. R. 324 (1861). See *Hamilton v. Lyons*, 5 O. S. 503, damages under 35 Geo. III. c. 5, s. 10.

(*n*) *Brega v. Dickey*, 16 Gr. 494 (1869).

(*o*) 8th Ed., section 830.

(*p*) Citing *McFarland v. McClees*, 17 W. N. C. 547; *Harrison v. Brega*, *supra*.

(*q*) Citing *Whiteman v. Hawkins*, 4 C. P. D. 13.

(*r*) Citing *Shepherd v. Field*, 70 Ill. 438.

*Are costs indirectly occasioned by registrar's mistake recoverable as damages?—See Harrison v. Brega (s), Kimball v. Connolly (t).*

*How far registrar entitled to notice under R. S. O. 1887, c. 73, s. 14:—*Generally speaking, it is advisable to give a registrar notice of action, but this does not appear to be necessary in case where a municipality is suing a registrar for fees which he has neglected to pay over under sections 119, 120: "This objection that he was not served with notice of action is equally untenable. He is sued for not paying over money which under the Act he was bound to pay to the plaintiffs, not for doing some act which has occasioned an injury to the plaintiffs, that he was required to do in the performance of his duty; and so is not within the protection of sections 1 and 20 of Chap. 73, R. S. O.: *Ross v. McLay*, 40 U. C. R. 83; *McLeish v. Howard*, 3 App. 503" (u).

*Special remedies against a registrar:—*Proceedings in the nature of a *quo warranto* may be taken against a person wrongfully occupying the office of registrar (v); *mandamus* will lie against a removed officer to compel him to deliver up his books (w). For remedy by seizure and proceedings by fine and imprisonment, see sections 33, 34, *infra*.

*Indictment against registrar and deputy for misdemeanor:—See Regina v. Benjamin (x).*

(s) 20 U. C. R. 324 (1861).

(t) 3 Keyes, 57, cited in Sedgwick on Damages, 8th ed. s. 560.

(u) Cameron, J., in *Bruce v. McLay*, 3 O. R. 23 (1883). Cf. *Harrison v. Brega*, 20 U. C. R. 324 (1861).

(v) See Throop, Ch. XXX.

(w) See *ib.* section 787, for cases where *replevin* will lie. See also *ib.* section 833 for cases where *mandamus* will not lie against registrars to compel cancellation of record.

(x) 4 U. C. C. P. 179.

26. (1) The Registrar or his deputy shall, for the discharge of all duties belonging to the said office, attend at his office from the hour of ten in the forenoon until four in the afternoon every day in the year, holidays excepted and no instrument shall be registered by him on any holiday, nor shall any instrument be received for registration by him, except within the hours above named. R. S. O. 1887, c. 114, s. 22.

Hours of attendance at office.

(2) Provided that the Registrars for the east and west divisions of the City of Toronto and for the County of York, or their respective deputies, shall attend at their offices for the transaction of business on Saturday, from the hour of ten in the forenoon until one in the afternoon, and no longer, and no instrument shall be received by them for registration on that day except within the hours above named. 53 V. c. 22,

*Attendance of deputy and significance thereof:—*  
Among the many ingenious quibbles that were raised in the test case of *MacNamara v. McLay* (y) the attendance of a deputy was relied on as a reason for charging a general search where the plaintiff himself had read the index:

"Then the defendant tells us, and the plaintiff admits, that when the plaintiff was reading the index, the deputy registrar was in attendance, and was ready to make any search the plaintiff required.

"No doubt it was the defendant's duty to have some one there ready to make searches for whoever lawfully required them, whether he was engaged in reading an index, or came to the office only to have the searches made. All comers were entitled to that attention. But that it was the duty of the deputy to abstain from all other work is not so plain. If he had to do so in order effectually to preserve control of the index book and protect it from injury, he was in my judgment inadequately paid by the twenty-five cents, and the Legislature might properly make further provision on the subject."

(y) 8 A. R. 319 (1883).

*Delivery to registrar at his house :—*Apparently section 26 would preclude delivery of a deed for registration otherwise than at the regular office during the regular hours (z).

Registrars  
to make  
searches  
and ab-  
stracts.

27. (1) The Registrar shall, when required, and upon being tendered the legal fees for so doing, make searches and furnish copies and abstracts of or concerning all instruments or memorials registered, mentioning any lot of land as described in the patent thereof from the Crown, or any lot described by number or letter on any registered map or plan subsequent to the registration of the map or plan, or any part of a lot where the same is clearly described and can be identified in connection with the chain of title, or has been ascertained by actual survey; and of and concerning all wills, deeds, orders, or other instruments recorded, as may be requested of him in writing, if a writing is demanded by the Registrar; and he shall exhibit the original registered instrument, and also the books of the office relating thereto when the party desires to make a personal inspection thereof, and shall give certificates of all copies and extracts under his hand of and concerning the parties to any of such documents, or of the witnesses to the same, or any other particulars which may be required, but no Registrar shall allow any such book or instrument to be taken out of his possession or custody. R. S. O. 1887, c. 114, s. 23.

To exhibit  
originals of  
instru-  
ments, etc.

To certify  
copies, etc.

Certificate  
of Registrar  
on abstracts.

(2) Every abstract furnished by a Registrar shall be commenced and certified to in the words following :—

"Ontario, Registry Office, County of                      Abstract of  
title                      " and the certificate on every abstract shall be in  
the words following : " I certify that the above (*or the following*)  
are correct extracts from the only instruments recorded in this  
office which mention or refer to (*describe property sufficiently for  
identification*). This abstract does not purport to give entries  
from the General Register.

"Dated at                      this                      day of                      A.D.  
at the hour of

Registrar, or Deputy-Registrar." { L. S. }

Liability  
for errors  
or omis-  
sions.

(3) No Registrar shall be liable in respect of entries of instruments or errors or mistakes in the entries of instruments or in respect of omissions by any of his predecessors in the office of Registrar, nor for any defect or inaccuracy in any

(z) See *Fisher v. Bishop*, 17 N. S. R. (b R. & G.) 451.

abstract or certificate arising from such error, mistake or omission, unless he had become aware or had knowledge of the error or mistake in the said entries, or unless such abstract or certificate shall be defective or inaccurate to the knowledge of the Registrar or his deputy or the clerk by whom such abstract or certificate is made or signed.

*Origin and effect of this section* :—The history of this section is given in *MacNamara v. McLay* (a). After citing the decision of Chief Justice Robinson (b), delivered in 1859, to the effect that the Registrar was not in terms bound to produce his books (the alphabetical index, in particular), and that owing to the danger of mutilation it was not public policy to make him do so. Patterson, J.A., goes on to say :—

“ But in 1865, a new registry law was passed (29 V. c. 24), the eighteenth section of which expressly made it the duty of the Registrar when required upon being tendered the legal fees for so doing, to make searches, and furnish copies or abstracts of or concerning all memorials, etc., and to exhibit the original registered instrument, and also the books of the office relating thereto, whenever the party desired to make a personal inspection of such books. There was nothing in this which, if it had been in force in 1859, would have necessarily led to a different decision in Webster's case, because what was asked for there was not the inspection of any particular original instrument, or of the books of the office relating to any such instrument; but the express statutory right declared to inspect instruments and books, indicated that the general policy enunciated in Webster's case no longer prevailed.

“ After confederation the Ontario Legislature passed the Registry Act, 31 V. c. 20, adopting in section 20 the 18th section of the Act of 1865, adding the caution, ‘ but no

(a) 8 A. R. 319 (1883). For liability of registrar for refusal to permit inspection of records, or for furnishing incorrect copies, see *Throop on Public Officers*, s. 744.

(b) In *Webster and Registrar of Brant*, 18 U. C. R. 87.

Registrar shall allow any such book or instrument to be taken out of his possession or custody.'"

"*Make searches and furnish copies and abstracts*":— There does not seem to be an imperative duty cast on the Registrar to go behind the abstract indexes in preparing abstracts of titles: "He has to or is entitled to examine every instrument; . . . he is not bound to do so, it is true; he can rely upon the correctness of his abstract index if he so pleases, as decided in *MacNamara v. McLay*, 8 A. R. 319" (c).

*What amounts to a mere copy of an abstract index?*— In the above case, *MacNamara v. McLay*, the distinction between the Registrar relying on his abstract index and his furnishing a mere copy of his abstract index is well brought out;—

"The fact relied on is that it was simply a copy of the abstract index. If the plaintiff had asked for a copy of the index, the defendant would certainly have been confined to the proper charge for that. I do not say to the price per folio for copying merely, which is all the plaintiff would concede to him, for I think he would have had a right to 25 cents more for searching for the index. But the plaintiff neither asked for a copy, nor did he, if he knew it to be a copy only, by any acceptance of it as a copy only, consent to free the defendant from the responsibility attaching to the demand in the shape it was made as for an abstract of the title. If it had happened that some deed had been omitted from the index the defendant would have been liable to the fate of the defendant in *Harrison v. Brega*, 20 U. C. R. 324. I do not perceive any reason why a Registrar who is asked for an abstract of title by, say an intending purchaser, and who has the day before prepared from actual searches a similar abstract for

(c) *Per* Robertson, J., in *Morse v. Lamb*, 23 O. R. 174 (1893).

another inquirer into the same title, should not send, in compliance with the second requisition, a copy of his first abstract, and charge the full price for each. In practice that course would always be taken, and no one would be injured by it. The accident of the original being in the abstract book which the Registrar had made himself from actual searches, and which saved him the useless toil of going over the same ground, instead of being in his copying book or in his draft, cannot make any substantial difference" (d).

*Character of searches properly required of registrar :—*

"I understand the duty cast upon the Registrar in the matter of searches to be ministerial in its nature (e). It is no part of that duty to construe a document or give an opinion upon its contents. He must search for the entry or the document desired, and exhibit it, or communicate its contents, as the case may be, to the inquirer. He would be bound to search for the abstract index of a lot and to show it if required, as I interpret his duty, or to communicate its contents by copying them, or such part as might be asked for.

"He was not, however, bound to do the other things, namely, to ascertain which of all the instruments registered were deeds of grant; and which was the last executed of those deeds, and which of the instruments created incumbrances, and which of those were subsisting incumbrances. He might, as I understand his duty, have declined to undertake the task. If he were now suing for payment of it, there might be room to question his legal right. But the plaintiff paid him for the service which involved the performance of acts not foreign to his office, though not compulsory on him, which, on the principle of

(d) 8 A. R. 341 (1883).

(e) Cf. Throop on Public Officers, s. 742.



the prescribed tariff, would at the very least have entitled him to what he has been paid" (*f*).

*Danger of allowing promiscuous searches*:—Burton, J.A., has very strongly pointed out the danger of subjecting, "unnecessarily, the affairs of individuals to the impertinent curiosity of persons in no way interested in a particular property" (*g*). He says: "I can imagine nothing more dangerous than thus to give to a class of persons not inaptly styled 'land sharks' an opportunity at a minimum of expense to discover the defects in title, and aid them in their nefarious trade, to say nothing of the risk to which the Registrars might thereby be exposed of alterations being made in figures, or other particulars, in the abstract index, and thus leading the Registrar to furnish an incorrect abstract" (*h*).

*"Or any part of a lot"*:—"We do not think the Registrar is bound in any way to give extracts or certificates of such portions of the lot as are not asked for, nor can he compel a person to pay for such" (*i*).

*Form of abstract*:—An applicant for an abstract is entitled to have the same certified to in the form prescribed by the statute, and a mandamus will lie compelling the Registrar to deliver a proper abstract and certificate (*j*).

*Certificate by deputy registrar*:—The form given in the above sub-section 2 provides for a certificate being given under the hand of the deputy registrar (*k*).

(*f*) Patterson, J.A., in *MacNamara v. McLay*, 8 A. R. 337 (1883).

(*g*) *MacNamara v. McLay*, 8 A. R. 323 (1883).

(*h*) *Ib.*

(*i*) *Hope v. Ferguson*, 17 U. C. R. 221 (1859), followed in *McDonald v. Bell*, 21 U. C. R. 33 (1861).

(*j*) *Re Registrar of Carlton*, 12 U. C. C. P. 225 (1862).

(*k*) *See Gamble v. McKay*, 7 U. C. C. P. 319.

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Sub-section 3 is new legislation ; it defines the limits of the registrar's right to rely in preparing abstracts of title upon the abstract index left by his predecessors in office. Probably the necessity for this sub-section arose from the following passage in *MacNamara v. McLay* :

"The fact that the defendant had himself actually made the searches, and so was certifying to what he had himself verified, is of consequence, and will distinguish the circumstances from a possible case in which a registrar who has the custody of an index which he neither made or verified, may impose a copy of it upon one, who applies for an abstract of the title. Such an application would, I apprehend, be always entitled to the personal verification by the registrar, or by some one acting for him, of whatever he certifies, and ought not to be left to rely on his responsibility in case there happened to be errors in the work of a careless predecessor in office which he chose lazily to adopt as his own (l)."

28. Every Registrar under this Act shall have a seal of office, to be approved of by the Inspector, and on request of any person or persons, body corporate or otherwise, shall furnish an exemplification or certified copy under his hand and seal of office, of any instrument or memorial deposited, registered, or filed, and kept in his office as Registrar, which exemplification or certified copy shall be received as *prima facie* evidence in every Court in Ontario, in the same manner and with the same effect as if the original thereof, in his office, was produced ; and no Registrar or Deputy Registrar shall be required to produce any paper in his custody as Registrar or Deputy Registrar, unless ordered by a Judge of one of the Courts of Ontario, which order shall be produced to the officer issuing the subpoena requiring such production, and shall be by him noted in the margin of the subpoena, and signed by such officer. R. S. O. 1887, c. 114, s. 24. See also R. S. O. c. 61, s. 43. See also 53 V. c. 21.

Registrar to have a seal of office.

Not bound to produce any papers, except on order of a Judge.

*Certified copy of memorial*:—A certified copy of a memorial of a deed is evidence of the memorial and is some evidence of the contents of the deed itself (m).

(l) 8 A. R. 319 (1883), Patterson, J.A.

(m) Lynch O'Hara, 6 U. C. C. P. 259, 266 (1857). But see *supra*, Cap. 112, also Gough v. McBride, 10 U. C. C. P. 166 (1860) ; Anley v. Breo, 14 U. C. P. 371 (1864), *Re Higgins* 19 Gr. 303 (1872).

*Certified copies as evidence*:—See R. S. O. 1887, c. 61, ss. 42-45.

*Subpœna to registrar*:—The practice in this matter is regulated by Con. Rule 560, which is as follows:—"No subpœna for the production of an original record, or of an original memorial from any registry office, shall be issued, unless the order of the Court or a Judge is produced to the officer issuing the same, and filed with him, and unless the writ is made conformable to the description of the document in such order."

*Is personal attendance of registrar necessary*:—If the personal attendance of the registrar be necessary, he should be informed so, or the Court will not grant an attachment against him, his clerk having attended with the required book (n).

It is not sufficient to serve one of the clerks or deputies of a registrar as it would be a breach of duty for them to bring away documents without the permission of the head of the office (o).

*Fees payable to registrar as witness*:—A registrar required to attend in his professional capacity is entitled to an allowance of \$4.00 per day (p).

#### BOOKS OF OFFICE.

Treasurer  
to provide  
proper  
books.

29. The treasurer of the county or city shall provide a fit and proper registry book for each township, reputed township, city, town, town plot laid out by the Crown, and incorporated village, the limits whereof are defined by law, and all index and other books required for the business of the office; and all registry books shall be as nearly as may be of the like size and description as those heretofore furnished, and shall continue to be of one uniform size or nearly so; and from the time the books are so provided and received at the Registry Office, the person who holds and executes the office of Registrar, shall keep and cause to be used for that purpose, a separate registry

(n) See *Bennett v. Jones*, 2 Chit. Rep. 403 (1815).

(o) *Austen v. Evans*, 2 M. & G. 430 (1841).

(p) *In re Nelson*, 2 Chy. Ch. R. 252. But see 57 V. c. 25.

book for and of each township, reputed township, city, town, town plot laid out by the Crown, and incorporated village, the limits whereof are defined by law, within the county, for which he holds office; and he shall also keep and cause to be used for that purpose a general registry book for the whole county, in which shall be recorded all wills, probates, grants of administration and instruments in which there is a general devise, conveyance or power affecting lands without local description, and in which book an alphabetical index of the names of all the parties mentioned by name in such instrument shall also be kept; and whenever any Registrar requires a new registry book, or any other book for the use of his office, the same shall, on his application therefor, in writing, be furnished to him by the treasurer, and all books so furnished shall be paid for by the treasurer out of the county or city funds as the case may be; and all books so furnished, used and kept, shall be deemed to be the property of Her Majesty for the use and benefit of the public; and the Inspector shall have power, when, for the despatch of business, he finds it necessary, by order in writing, to permit more than one registry book to be in use at the same time for the same municipality. R. S. O. 1887, c. 114, s. 25.

General  
Registry.

New books.

*"The property of Her Majesty"* :—"When we bear in mind that under the former Acts the registrars furnished their own books, and had on more than one occasion claimed to remove them after ceasing to be registrars on the ground that they were then private property, and *did not belong to Her Majesty for the use of the public*, we can see a very sound reason for this enactment" (q).

30. If the treasurer refuses or neglects to furnish such books within thirty days after application therefor, the Registrar may provide the same and recover the cost thereof from the municipality of the county or city in default. R. S. O. 1887, c. 114, s. 26.

If the  
Treasurer  
neglects to  
provide  
books.

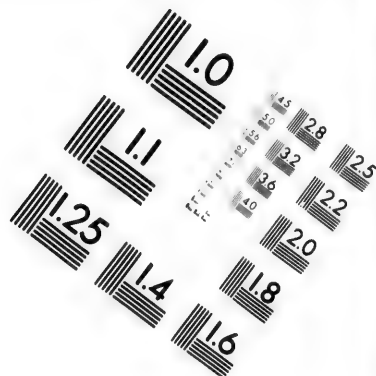
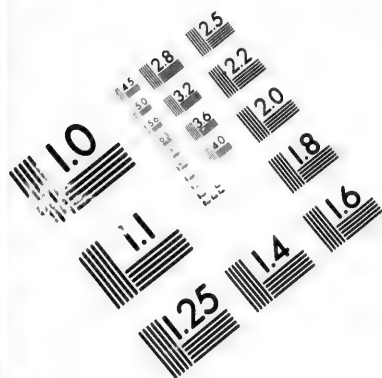
*Can person supplying registrar sue municipality?*—  
See *Read v. Municipality of Kent* (r).

31. The Judge of the County Court or Warden of the county, or Mayor of a city, or the Stipendiary Magistrate of the district shall give a certificate respecting each registry or

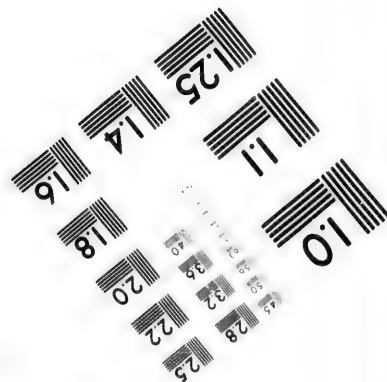
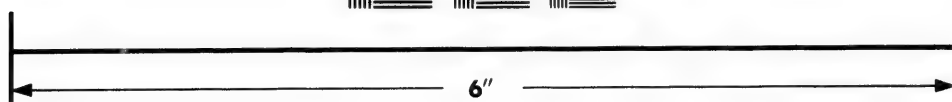
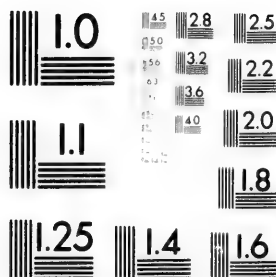
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(q) Burton, J.A., in *MacNamara v. McLay*, 8 A. R. 323 (1883).

(r) 13 U. C. R. 572 (1856), point not decided, because the treasurer had not been given an opportunity of supplying books as is required by the Act.



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Magistrate  
to certify  
books.

other book, so furnished or provided, in the form of Schedule D. to this Act, or to the like effect, and in case of refusal shall be liable to the same penalties as are imposed by section 34 of this Act. R. S. O. 1887, c. 114, s. 27.

Provision  
when any  
place is sep-  
arated from  
a county.

32. (1) Where any county, city, town, town plot laid out by the Crown, incorporated village, township, reputed township or place, making part of a county wherein a separate Registry Office is or has been kept, is or has been detached from some union or county and set apart for registration purposes, or attached to or made part of another county for which a separate Registry Office is also kept, or where a separate Registry Office is established in any county or junior county, according to the provisions of this Act, the Registrar of the county from which such localities are so detached, shall deliver to the Registrar of the county set apart, or of the county whereunto the same is attached, the registry book or books and all other books and indexes which have been kept according to the statute, exclusively for such county, city, town, town plot, incorporated village, township, or reputed township or place, the original memorials and original duplicates of all deeds, conveyances and wills of, or relating exclusively to, any lands within the same, and all other instruments, and all maps of cities, towns or villages within the same, lodged according to law in his office.

Certain  
books, etc.,  
to be deliv-  
ered.

Delivery  
of abstract  
index books,  
registry  
books, etc.

(2) Such first mentioned Registrar shall also deliver an abstract index book of all titles to lands within each of the detached localities, registered before separate registry books were kept for each township or place; and also a proper registry book containing full and complete copies of all memorials and other registered documents affecting such lands, which, by reason of their relating to two or more localities, cannot be delivered, or which, though affecting one locality are entered in a registry book that is not delivered over, such copies being entered in the book in the same order and relation in which they were originally inserted; and there being inserted on the margin of the book opposite to each memorial or instrument, the number thereof and the particular time at which the memorial or instrument was originally recorded as indorsed on the back thereof by the Registrar or his deputy, at the time of the original registration thereof. The book shall be accompanied by an alphabetical index of names; he shall also deliver as aforesaid a proper registry book containing a copy of all wills and other instruments registered in any general registry book in which the names of any of the parties thereto have been entered in the alphabetical index, kept for the locality so being detached; and shall also deliver a true copy of the alphabetical index attached to any general registry book; he shall also carefully compare all of such entries with the original entries



in the registry books in his office and in case a certificate to that effect in each book before delivering the same. Instruments received by the registrar of one county or registry division from the registrar of another after the year 1885, shall be copied by the registrar by whom they were or are received.

(3) The Registrar receiving such books, and his successors shall keep the same among the registry books of his office, and deal with them in all respects in like manner, as those originally supplied to and kept therein. R. S. O. 1887, c. 114, s. 28; 52 V. c. 19, s. 4.

33. Any Registrar who refuses to deliver the books, plans, duplicates, indexes or memorials, aforesaid, within six months after demand in writing therefor, made upon him by the Registrar entitled to receive the same, shall upon conviction thereof, before any Court of Oyer and Terminer and General Gaol Delivery, forfeit his office, and be liable to a fine, in the discretion of the Court, not exceeding \$400. R. S. O. 1887, c. 114, s. 29.

Penalty on Registrar refusing to deliver books, etc.

*Books that go with separate Registry Office*:—"In our opinion the law has clearly required that the registry books which have been kept for any city, township, etc. shall be delivered over to the registrar for such city, etc. when it shall have become detached, and has either been attached to another county or has had a registry office appointed within itself" (s).

*Delivery of copies, where original books not transferred*:—Cf. *Durand v. City of Kingston* (t).

34. In case a Registrar is removed from or resigns his office, he shall forthwith deliver up all books, plans, instruments, memorials and indexes in his possession as Registrar to the person who is appointed Registrar in his stead, or to any other person who may be specially appointed in writing, by Her Majesty's Attorney-General of Ontario to receive the same, and if the Registrar refuses to do so, the Attorney-General may direct the sheriff of the county to seize and take immediate possession of the same wheresoever found, and the Registrar so offending shall be liable to a fine, in the discretion of the Court, not exceeding \$2,000, and to any term of imprisonment, if the Court thinks fit to impose it, in addition to the fine, not exceeding one year. R. S. O. 1887, c. 114, s. 30.

Registrar removed or, resigning to deliver up books to new Registrar, etc.

Proceedings in case of refusal.

(s) *Registrar of London v. Registrar of Middlesex*, 17 U. C. R. 382 (1859) *mandamus*.

(t) 14 U. C. C. P. 439 (1864), a *casus omissus* at that time.

*Proceedings in case of refusal*:—For the irregular removal of books by one registrar from the office of another and the complications that arose, see *Re McLay (u)*.

For other remedies in case of refusal, see under section 25.

When any book becomes unfit for further use copy to be made.

Original to be preserved.

Repair of books, maps, etc.

35. Where in any Registry Office, any book from age or use, is becoming obliterated or unfit for future use, the Inspector shall, by directions in writing under his hand, order such book to be re-copied in a book of the same description as that required under section [25] of this Act, so far as can be deciphered by examination thereof, and of the original memorials relating thereto, which book having the order of the Inspector for the copying thereof, under the hand of the Inspector, inserted at the beginning of the book, and having the affidavit or declaration of the Registrar or his deputy, at the end of the book, to the effect that the book so copied is a true copy of the original book of which it purports to be a copy, shall be to all intents and purposes, accepted and received as the original book, and as *prima facie* evidence that the copy is a true copy of the original book; every original book shall, nevertheless be carefully preserved, notwithstanding a copy thereof has been made, and every Registrar or his deputy shall be obliged to make his affidavit or declaration in this section mentioned; and the Inspector shall have power to order any book which is out of repair and unfit for use to be repaired in such manner as he thinks necessary; and he shall also have power to order plans and maps deposited in any Registry Office, to be copied, mounted or bound, to be preserved in such manner as he thinks necessary. And (subject to any direction of the Lieutenant-Governor in Council in this behalf) he shall in like manner have power to order as many counterparts or copies of any abstract index book to be made as he shall deem necessary for the public convenience; also to order new plans and surveys to be made of any locality or territory in any registry division which in his judgment have become necessary and to order new abstract indexes to be made where the indexes in use have become complicated or otherwise inconvenient. R. S. O. 1887, c. 114, s. 31; 52 V. c. 19, s. 5.

"Section 25" in the fifth line of section 35 *supra* has been corrected into "section 29" by 57 V. c. 35, s. 4, *infra*.

(u) 24 U. C. R. 54 (1864).

36. The Registrar shall, in a proper book kept for the purpose, and called the "Abstract Index," keep entered under a separate and distinct head each separate lot or part of a lot of land as originally patented by the Crown, or as defined on any plan of the subdivision of such land into smaller sections or lots after such plan has been filed in the Registry Office; and every instrument registered on and after the first day of January, 1866, mentioning such parcel or lot of land or other subdivision, and the names of every person to each instrument, and the nature of it (such as a "Will," "Grant," "Lease," "Power of Attorney,") the numbers of registration of all such instruments, for each municipality in which the land mentioned therein is situate, and the day, month and year of their registration, and the consideration or mortgage money mentioned therein, and a sufficient description of the land therein mentioned as to readily identify its location, shall, by the Registrar, in addition to all entries by law required, be entered in regular order, and rotation under the proper heading of each such separate parcel or lot of land mentioned in such instrument, and the book or books, to be so kept by each Registrar, for the purpose of making the said entries, shall be in the form or nearly so of Schedule E, to this Act. R. S. O. 1887, c. 114, s. 32; 52 V. c. 19, s. 5, s-s. 2.

Abstract  
index of  
lots.

*Abstract index, right of public to inspect:*—The right of the public to inspect, or of the registrar to withhold from inspection the abstract indexes, has more than once been judicially discussed and is not even now very clearly defined. The better, or at least as far as the public is concerned the more convenient opinion, appears to be that of Patterson, J.A., who says:—"There does not appear to me to be any tenable ground for hesitating to recognize the abstract index book as one of those books that may be inspected"(v).

*"Consideration or mortgage money mentioned therein":*—Spragge, C.J.O., notes the omission of this requisite from the abstracts produced in *MacNamara v. McLay* (w).

*Search for an abstract index:*—The suggestion made by Patterson, J.A., in *MacNamara v. McLay*, *supra*, that

(v) *MacNamara v. McLay*, 8 A. R. 319 (1883). See dissenting judgment of Burton, J.A., in this case; also *Ross v. McLay*, 25 U. C. C. P. 190; *Webster & Registrar of Brant*, 18 U. C. R. 87.

(w) 8 A. R. 345 (1883).

as the registrar has to search for a document or abstract index, therefore, he is entitled to charge for that search,—this suggestion has not met with favour from the bench; Spragge, C.J., saying in this connection:—"He has of course to find it," (*i.e.* the document or abstract index) "but I see no reason or authority for his making a charge for finding it. The charge is *ingenious*, but I think has nothing else to recommend it" (*x*).

For the system of registering before the use of abstract indexes, see *Smith v. Ridout* (*y*), where it was decided that what the statute required was "a distinct registration of the memorial in the proper book of each township in which the lands contained in the deed are situated."

For liability of registrar, for mistakes in abstract index see notes under sections 19 and 25, *supra*.

Alphabetical index of names for each locality.

37. Every Registrar shall also, for each township, city, town, and incorporated village, keep an Alphabetical Index of names, exhibiting in columns the number of each instrument, the names of the different grantors, and the names of the grantees, according to the form of Schedule F. to this Act. R. S. O. 1887, c. 114, s. 33.

*Omission to insert deed in alphabetical index*:—In *Lawrie v. Rathbun* (*z*), an argument was set up that as the registrar had omitted to insert in the alphabetical index the particulars of a certain deed, therefore the registration was void and the deed had lost its priority. The argument did not prevail.

#### INSTRUMENTS THAT MAY BE REGISTERED.

Instruments which may be registered.

38. Subject to the provisions of the next section, all instruments mentioned in section 2 of this Act may be registered. R. S. O. 1887, c. 114, s. 34.

See notes to section 2, *supra*.

(*x*) *Id.*

(*y*) 5 U. C. R. 617 (1849). Cf. section 29, *supra*.

(*z*) 38 U. C. R. 255 (1876).

39. This Act shall not extend to any lease for a term not exceeding seven years, where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years. R. S. O. 1887, c. 114, s. 35. Registration of leases.

*Effect on leases over seven years:*—An unregistered lease is not void as between lessor and lessee (*a*).

*Covenant for renewal in lease:*—A lease for four years, with a covenant for renewal for four years more, was held as against a subsequent mortgagee of the lessor, not to require registration, actual possession having gone along with the lease (*b*).

*Possession must go with the lease in question:*—"The unregistered lease and the possession are connected together, and the two united prevail against the registered title. But it does not follow that a tenant having possession under a current lease, which is his sole title, can set up the possession as sustaining a lease for a term to commence *in futuro* and to bring it within the exception" (*c*).

*Mortgage of lease:*—See *Wright v. Stansfield* (*d*).

*Assignment of lease:*—For how far an assignment of lease needs to be registered and effects of unnecessary registration; see *Doe Kingston Building Society v. Rainsford* (*e*). *Quaere:*—Has registration of the assignment of a lease the same effect as registering the lease? (*f*).

*Assignment of mortgage of leaseholds:*—See *Williams v. Sorrell* (*g*).

(*a*) See *Hodson v. Sharpe*, 10 East, 350 (1808).

(*b*) *Latch v. Bright*, 16 Gr. 653 (1869), *Doe Kingston Building Society v. Rainsford*, 10 U. C. R. 236 (1853), discussed.

(*c*) *Davidson v. McKay*, 26 U. C. R. 310 (1867). See *Drew v. Lord Norbury*, 3 J. & Lat. 267; *Sutherland v. Walker*, 1 Kerr (N.B.) 141.

(*d*) 27 Beav. 8 (1858).

(*e*) 10 U. C. R. 236 (1853); see also *Bythewood & Jarman: Conv.* 4th ed. Vol. 6, p. 15.

(*f*) See *Honeycombe v. Waldron*, 2 Str. 1064, where it was held not to have such effect.

(*g*) 4 Ves. 389 (1799).

*Lease by mortgagee*:—See *Ball v. Riversdale* (h).

*Settlement of leaseholds*:—See *Hill v. Mill* (i).

*Effect of recital of lease in deed*:—See *Downes v. Gordon* (j).

#### PROOF OF REGISTRATION.

Proof for  
registra-  
tion.

40. (1) In the case of an instrument other than a will, grant from the Crown, Order in Council, by-law or other instrument under the seal of any corporation, or certificate of judicial proceedings, a subscribing witness to the instrument shall in an affidavit setting forth his name, place of residence, and addition, occupation or calling, in full, swear to the following facts :

*Place of residence*:—The grantors in a memorial were described as “of the City of London,” and one witness described as “of London”: *held sufficient* (k).

(a) To the execution of the original and duplicate if any there be ;

*To the execution*:—Where the affidavit of the witness stated that “he had seen the due execution of the deed”: *held sufficient* (l).

*Execution by whom*:—Persons may be named as parties to an instrument without their necessarily executing the instrument, as in the ordinary case of a grantee. It is the practice for registrars to require affidavits of execution as to all the parties who actually execute, but not as to those who do not execute (m).

(b) To the place of execution ;

For case where place of execution omitted from affidavit, see *Magrath v. Todd* (n).

(h) Beat. 550.

(i) 12 Ir. Eq. R. 107 ; 3 H. L. C. 828.

(j) 5 Allen (N.B.) 174.

(k) Reid v. Whitehead, 10 Gr. 446 (1864).

(l) Reid v. Whitehead, 10 Gr. 446 (1864).

(m) See Reg. v. Middlesex, 1 El. & El. 322 ; 5 Jur. N. S. 98.

(n) 26 U. C. R. 87 (1866).

(c) That he knew the parties to the instrument, if such be the fact; or that he knew such one or more of them, according to the fact;

"*Knew the parties*":—The Land Titles Act is more exacting than the Registry Act as to the degree of knowledge, requiring that the witness should be well acquainted with the parties (o). The period of acquaintance after which a witness feels qualified to identify a party by taking the affidavit under the Registry Act, is sometimes an exceedingly brief one.

(d) That he is subscribing witness thereto.

For case of witness subscribing his name after registration, see *Muir v. Dunnett* (p).

(2) The affidavit may be in the form of Schedule G to this Act, or to the like effect. R. S. O. 1887, c. 114, s. 36.

Form of affidavit.

41. The affidavit shall be made on the instrument or securely attached thereto, and the instrument and affidavit shall be copied at full length in the Registry Book. R. S. O. 1887, c. 114, s. 37.

Affidavit to be registered.

42. Where an instrument is executed by one or more grantors, but not by all of them, in presence of the same witness or witnesses, and by one or more of the other parties thereto in presence of another witness or other witnesses, then and in such case the witness or one of the witnesses, whether the same be so executed in the same or in different places, shall make an affidavit in accordance with section 40 of this Act as to each separate and distinct execution of the instrument before the same is registered. R. S. O. 1887, c. 114, s. 38.

When different witnesses see different grantors execute.

43. An instrument within the meaning of section 2 of this Act, not purporting to convey the land therein mentioned, but which in its nature is, or purports to be given as a security for the payment of a debt or liability incurred by the person giving the same in respect of a purchase or delivery of any goods or in respect of an advance or loan of any money, shall not be registered unless the affidavit of execution states that the instrument was read over and explained to the owner or person executing the same, and that he appeared perfectly to understand the same, and was informed that it might be registered as an incumbrance on his land, such affidavit to be in the form in Schedule H to this Act, or to the like effect. 51 V. c. 17, s. 2.

Affidavit of execution in case of instruments given in respect of purchase or delivery of goods.

(o) R. S. O. 1887, c. 116, forms 42, 43.

(p) 11 Gr. 85 (1864).



For discharge of "lien notes" as the instruments mentioned in this section are sometimes called, *see* section 82 *infra*. For priority of same, *see* section 85 *infra*.

Certain defects in affidavit not to invalidate registration.

44. No registration under this Act of any instrument shall be deemed or adjudged void, or defective by reason of the name, place of residence, addition, occupation or calling of the subscribing witness thereto not being set forth in full, or being improperly or insufficiently given or described in the affidavits mentioned in and required by sections 40 and 43, nor by reason of any clerical error or omission of a merely formal or technical character in the affidavit. R. S. O. 1887, c. 114, s. 39.

*Origin of section 44*:—Section 44 was introduced by 36 V. c. 17, s. 2. The object was to amend the law as laid down in *Robson v. Waddell* (q), where the omission of the addition of a witness was held to void the registration.

Name of witness need not be set forth in full in affidavit.

45. Any instrument may be registered under this Act, notwithstanding that the Christian name or names of the subscribing witness making the affidavit is or are only set forth therein by initial letter or letters, or abbreviation or abbreviations, and not in full. R. S. O. 1887, c. 114, s. 40.

*Origin of section 45*:—Section 45 was introduced by 36 V. c. 17, s. 3, passed to amend the law as laid down in *Boucher v. Smith* (r), where the omission of a Christian name in a memorial was held to vitiate the registration.

Before whom to be sworn.

46. Every affidavit made under the authority of this Act shall be made before some one of the following persons:

*One witness may swear before another*:—See *Reid v. Whitehead* (s).

In Ontario.

(1) If made in Ontario, it shall be made before—

The Registrar or Deputy Registrar of the county in which the lands lie,

Or, before a Judge of the Supreme Court of Judicature,

Or, before a Judge of a County Court within his county,

(q) 24 U. C. R. 574.

(r) 9 Gr. 355 (1862).

(s) 10 Gr. 446 (1864).

Or, before a Commissioner authorized by the High Court to take affidavits,

Or before any Justice of the Peace for the county in which the affidavit is sworn,

Or before a Notary Public having authority in Ontario.

*Or before a commissioner :—Cf. Re Registrar of County of York (t); Hiron v. Amherstburg (u).*

(2) If made in Quebec, it shall be made before—

In Quebec.

A Judge or prothonotary of the Superior Court or Clerk of the Circuit Court,

Or, before a Commissioner authorized under the laws of Ontario to take, in Quebec, affidavits in and for any of the Courts of Record in the Province of Ontario,

Or, before any Notary Public in Quebec, certified under his official seal.

(3) If made in Great Britain or Ireland, it shall be made before—

In United Kingdom.

A Judge of the Supreme Court of Judicature in England or Ireland, or of the Court of Session or the Justiciary Court in Scotland,

Or, before a Judge of any of the County Courts within his county,

Or, before the Mayor or Chief Magistrate of any city, borough or town corporate therein, and certified under the common seal of the city, borough or town corporate,

Or, before a Commissioner authorized to administer oaths in the Supreme Court of Judicature in England or in the Supreme Court of Judicature in Ireland or before a Commissioner authorized by the laws of Ontario to take, in Great Britain or Ireland, affidavits in and for any of the Courts of Record of the Province of Ontario,

Or, before a Notary Public certified under his official seal.

(4) If made in any British Colony, or Possession, it shall be made before—

In a British Colony.

A Judge of a Court of Record, or of any Court of Supreme Jurisdiction in the Colony,

(t) 3 U. C. R. 188 (1847), *held* sufficient.

(u) 11 U. C. R. 458 (1854), person signing himself "a commissioner, etc.," *held* insufficient.

Or, before the Mayor of any city, borough or town corporate, and certified under the common seal of the city, borough or town,

Or, before a Notary Public, certified under his official seal,

Or, if made in the British Possessions in India, before any Magistrate or Collector, certified to have been such under the hand of the Governor of such Possession,

Or, before a Commissioner authorized by the laws of Ontario to take in such British Colony, or Possession, affidavits in and for any of the Courts of Record of the Province of Ontario.

**In a Foreign Country.**

(5) If made in any Foreign Country, it shall be made before—The Mayor of any city, borough or town corporate of such country, and certified under the common seal of the city, borough or town corporate,

Or, before a Consul, Vice-Consul, or Consular Agent of Her Majesty, resident therein,

Or, before a Judge of a Court of Record or a Notary Public, certified under his official seal,

Or, before a Commissioner authorized by the laws of Ontario to take, in such country, affidavits in and for any of the Courts of Record of the Province of Ontario.  
R. S. O. 1887, c. 114, s. 41; 53 V. c. 30, s. 2.

(6) When an affidavit of execution is required to be made out of the Province before any of the officers mentioned in sub-sections 2, 3 and 4 of this section, and the officer has not an official seal, it shall be sufficient for him so to certify.

**Witnesses compellable to make affidavit.**

47. Every subscribing witness shall be compellable, when necessary, by order of a Judge of the High Court, or of a County Court, to make affidavit or proof of the execution of any instrument for the purpose of registration under this Act and to do all other acts necessary for the same purpose, upon being paid or duly tendered his reasonable expenses therefor.  
R. S. O. 1887, c. 114, s. 42.

*Witness compellable to make affidavit:—Held in Regina v. O'Meara (v) that a mandamus would lie to compel a witness to prove the execution of a deed and memorial for registry.*

(v) 15 U. C. R. 201 (1857).

48. The proof may be either by affidavit or by affirmation or declaration, when by the law of the country where the proof is made an affirmation or declaration may be substituted for an affidavit; and the Registrar shall receive the instruments so proved without any other or further proof of their due execution. R. S. O. 1887, c. 114, s. 43.

Affirmation or declaration in certain cases.

*Proof by declaration or affirmation*:—See R. S. O. 1887, c. 61, ss. 12-15 (Provisions as to Quakers, Menonists, Tunkers, etc.)—Cf. *re Lyons (w)*.

49. None of the persons authorized to take affidavits by this Act shall take an affidavit of the execution of an instrument, in case he is a party to the instrument; nor shall such affidavit for the proof of an instrument executed after the first day of January, 1866, be taken from a witness, unless the witness has subscribed his name in his own handwriting as such witness. R. S. O. 1887, c. 114, s. 44.

Parties not to take affidavits.

Witness to sign.

50. Where the witnesses to an instrument are dead or are out of this Province, or have become insane, idiotic, imbecile, or of unsound mind or understanding, and whether so found by inquisition or not, or where an instrument, not by law requiring an attesting or subscribing witness thereto, has been executed without an attesting or subscribing witness thereto, or in case it is proved to the satisfaction of the Judge in this section mentioned that the place of abode or residence of such first above mentioned witnesses is unknown, any person who is or claims to be interested in the registration of the instrument, may make proof before the Judge of a County Court in Ontario, of the execution of the instrument, and upon a certificate (according to the form of Schedule I to this Act) endorsed on the instrument and signed by the Judge that the Judge is satisfied by the proof adduced of the due execution of the instrument, the Registrar shall register the instrument and certificate. R. S. O. 1887, c. 114, s. 45.

Witness in case, absent, etc.

51. The seal of any Court of Record affixed to an instrument in writing, of itself, and the seal of any corporation affixed to any such instrument with the signature of the secretary or presiding officer thereof, shall be sufficient evidence of the due execution of the instrument by the Judge, Registrar, Clerk or officer of the Court signing the same, or by the corporation respectively, for all purposes respecting the registration thereof, and no further evidence or verification of the execution shall be required for the purpose of registration. R. S. O. 1887, c. 114, s. 46.

Seal of Court or seal of Corporation with signature of officer to suffice for registration.

(w) 6 O. S. 627.

Certificates for registry. Who may sign.

52. Certificates of proceedings in the High Court for registration may be signed by one of the Registrars of the Court, or by the Clerk of Records and Writs, or by a Deputy Clerk of the Crown or Deputy Registrar, or by any other official authorized by the Court to sign the same; and such certificates may be under the seal of the Court, or under the seal of office (if any) of the officer signing the same. R. S. O. 1887, c. 114, s. 47.

Action, etc., not notice unless certificate registered.

53. The instituting of an action or the taking of a proceeding, in which action or proceeding any title or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not being a party thereto, until a certificate signed by one of the officers in the preceding section mentioned, has been registered in the Registry Office of the Registry Division in which the land is situate, which certificate may be in the following form:—

Form of certificate.

"I certify that in an action or proceeding in the High Court, between A. B., of \_\_\_\_\_, and C. D., of \_\_\_\_\_, some title or interest is called in question in the following land (describing it)."

Dated at (stating date and place).

Not necessary in foreclosure cases.

But no certificate shall be required to be registered in any action or proceeding for foreclosure or sale upon a registered mortgage. R. S. O. 1887, c. 114, s. 48.

*Order for foreclosure:—Cf. Burrows v. Holley (x).*

*(As to vacating certificates of lis pendens, see 53 Vict. cap. 33.)*

For law as to *lis pendens* prior to 53 V. c. 33, see Clarke (y).

Judgment affecting lands may be registered.

54. Every judgment affecting land may be registered in the Registry Office of the county or other registry division where the land is situate, on a certificate signed by one of the officers in section 52 mentioned, setting forth the substance and effect of the judgment, and the land affected thereby. R. S. O. 1887, c. 114, s. 49.

*Alimony judgment:—*"Alimony is not an ordinary debt, and under the English Bankruptcy Act it is not the subject of proof on the bankruptcy of the husband, because

(x) 35 Ch. D. 123.

(y) The Law of *Lis Pendens*, 1889. See also Schofield v. Solomon, 54 L. J. Ch. 1101, 52 L. T. 679.

the amount may be increased or diminished, according to the varying circumstances of the insolvent. He is, notwithstanding his bankruptcy, liable to continue the payments: *Linton v. Linton*, 15 Q. B. D. 239. Our legislature, by section 30 of R. S. O. cap. 44, have not regarded an alimony judgment as an ordinary debt, but have by that enactment created the judgment, when registered, a charge upon the land for the payment of the alimony, the same as if it had been a life annuity which the husband had charged upon the land" (z).

*Registered decree afterwards reversed*:—See *Graham v. Chalmers* (a).

55. Where a power of attorney or any substitution thereof is registered, the Registrar shall deliver a certified copy or copies of such power or substitution as may be required of him, and of all the documents aforesaid connected with or relating to the same, under his signature and seal of office, in which certificate he shall declare the time, place and other particulars of registration as in other cases under this Act, and he shall also declare that the copy, which he so delivers, is a true copy of the power or substitution, and of all the other documents connected with or relating to the same of which they respectively purport to be copies, and that the originals have been duly deposited in his office according to the statute in that behalf. R. S. O. 1887, c. 114, s. 50.

Registrar to deliver certified copy of power of attorney registered.

56. Every such certified copy where the original power or substitution is deposited as aforesaid, may be registered in any other Registry Office by deposit thereof, without production of the original power or substitution, and without proof of any kind other than the production of the copy so certified as aforesaid. R. S. O. 1887, c. 114, s. 51.

Registration of certified copy.

57. Every such certified copy of a power of attorney or substitution, shall be received in all cases in place of the original as *prima facie* evidence of the original power or substitution and of due execution, provided that notice has been given in the manner set forth in section 45 of *The Evidence Act*. R. S. O. 1887, c. 114, s. 52.

Copy *prima facie* evidence.

Rev. Stat. c. 61, s. 45.

(z) *Abraham v. Abraham*, 19 O. R. 261 (1890), *MacMahon, J.*; affirmed 18 A. R. 436.

(a) 2 L. J. N. S. 69.

Registration of powers of attorney deposited in land titles offices.

58. Where a power of attorney or any substitution thereof is deposited in an office of land titles, a copy thereof certified by the master, or a local master, may be registered in any registry office in the same manner as a copy of a power of attorney certified by a registrar may be registered under section 56 of this Act. 53 V. c. 30, s. 9.

Registration of instrument in several registry offices.

59. Where it is desired to register an instrument other than a will, in more than one registry office, the same may be registered in like manner as is provided as to powers of attorney by sections 55 and 56 of this Act, and a certified copy of such instrument shall be received as evidence to the same extent as provided for in section 57 of this Act, respecting powers of attorney. R. S. O. 1887, c. 114, s. 53.

Registration of notarial copies of instruments executed in Quebec.

60. Every notarial copy of any instrument executed in the Province of Quebec, the original of which is filed in any notarial office according to the law of Quebec, and which cannot therefore be produced in Ontario, and every prothonotarial copy of any instrument executed in Quebec shall be received in lieu of and as *prima facie* evidence of the original instrument, and may be registered and treated under this Act for all purposes as if it were in fact the original instrument, and such notarial or prothonotarial copy shall be registered without any other or further proof of the execution of the same, or of the original thereof, with the seal of the Notary or Prothonotary attached. R. S. O. 1887, c. 114, s. 54.

#### MANNER OF REGISTERING.

##### *Generally.*

Instruments to be registered in full.

61. All instruments that may be registered under this Act, shall be registered at full length, including every certificate and affidavit, excepting certificates by the Registrar, accompanying the same, upon and by the delivery to the Registrar of the original instrument, when but one was executed, or when such instrument is in two or more original parts, upon and by delivery of one of such parts. R. S. O. 1887, c. 114, s. 55.

*Registration in full*:—Registration by memorial was replaced by registration in full on the 1st day of January, 1866 (b).

For exceptions in cases of mortgages, see 57 V. c. 35 *infra*.

*Registration by memorial*:—See *Hamilton v. Lyons* (c).

(b) 29 V. c. 24 (Can.), s. 37.

(c) 5 O. S. 573.



*Production of Registrar's book as evidence* :—See *Doe d. Prince v. Girty (d)*.

62. Where any instrument, signed or executed by any person by attorney, shall hereafter be registered, it shall be the duty of the Registrar on registration thereof to enter a note of the fact of such signature or execution by attorney, giving the name of the attorney or attorneys, as the case may be, on the abstract indices, and on all abstracts of title thereafter furnished by him relating to the lands affected thereby. R. S. O. 1887, c. 114, s. 56.

Special entry to be made when instrument executed by attorney

63. In case an instrument in two or more original parts is registered, the Registrar shall endorse upon each of such original parts a certificate of the registration, in the form of Schedule J to this Act, and any original, so certified, shall be received as *prima facie* evidence of the registration and of the due execution of the same. R. S. O. 1887, c. 114, s. 57; 52 V. c. 19, s. 5, s-s. 3. See R. S. O. c. 61, s. 44.

Instruments in two or more parts.

*The Registrar shall endorse* :—The Court will presume that the person signing as Registrar was the Registrar at the time of registration of the instrument bearing the certificate signed by him (*e*).

*Certificate of registration* :—The Registrar is required to examine the instruments and certify without qualification the facts which he is required to state. It is not sufficient for him to make such an indorsement as follows: "No. 41322, purporting to be a duplicate hereof, was recorded" (*f*).

*"Prima facie evidence"* :—Cf. *Gould v. McGregor (g)*.

*"Of the due execution"* :—This would include delivery (*h*).

(*d*) 9 U. C. R. 14.

(*e*) *Briggs v. McBride*, 1 Pug. & Bur. 663.

(*f*) *Re Bradshaw and Registrar of Simcoe*, 26 U. C. R. 464 (1867). See notes under section 93 *infra*.

(*g*) 13 N. S. R., (1 R. & G.) 330, followed in *McCormack v. Dennison*, 15 N. S. R., (3 R. & G.) 71.

(*h*) See *McDonnell v. McMaster*, 15 N. S. R. (3 R. & G.) 372.

Instruments relating to several lots in different localities.

64. Where an instrument includes different lots or parcels of land situate in different municipalities in the same county, it shall only be necessary to furnish one duplicate original of such instrument, with an affidavit of its execution, and the duplicate original and affidavit shall be copied into the registry book pertaining to each city, town, incorporated village, township, or place wherein the lands therein mentioned are situate, and the Registrar shall make the necessary entries and certificates accordingly. R. S. O. 1887, c. 114, s. 58.

For effect of this section, see *Re Lount (i)*; *Smith v. Ridout (j)*.

Registration of deeds containing lands situate in more than one county, and of which no memorial has been executed.

65. Every deed executed prior to the fourth day of March, 1868, affecting lands situate in more than one county, and of which said deed no memorial has been executed, may be recorded in any one of the counties in which some of the lands are situate, upon proof made in accordance with this Act, and in the other counties by deposit of a copy of every such deed and proof certified as is provided with respect to powers of attorney in sections 55 and 56 of this Act. R. S. O. 1887, c. 114, s. 59.

Copying into registry book.

66. The Registrar or Deputy Registrar of the county in which the lands are situate shall, upon production to him of the original instrument, duplicate or other original part thereof, together with an affidavit of execution, make an entry thereof in the abstract and alphabetical index books, and enter the said instrument in the registry book, in the order in which it is received, and he shall file the same with the affidavit of execution, and he shall endorse a certificate on every such instrument and upon every duplicate of the instrument in the form of Schedule J to this Act, and shall therein mention the certain year, month, day, hour and minute in which the instrument is entered and registered, expressing also in what book the same has been entered, and the number of registration, and the said Registrar or his deputy shall sign the said certificate when so endorsed, which certificate shall be allowed and taken as evidence of the respective registries in all Courts. R. S. O. 1887, c. 114, s. 60; 52 V. c. 19, s. 5 (4).

Filing instrument and affidavit

Certificate and its effect.

Registrar to see that all copies in registers are correct.

(2) It shall be the duty of the Registrar or his deputy or clerk appointed for that purpose, to see that all copies of instruments in the registers are true copies, and the Registrar or his deputy or clerk shall certify all such copies by writing a memorandum containing the words "examined (date) certified true

(i) 11 U. C. C. P. 97 (1861), fees payable.

(j) 5 U. C. R. 617 (1849).

copy" in the margin opposite each copy in the register, such memorandum to be signed by the initials of the Registrar or his deputy or clerk making the examination. When a register is completed, the Registrar or his deputy or clerk, as the case may be, shall at the end thereof show by statutory declarations that the copies contained in such register and certified by them respectively, are true copies of the original instruments of which they purport to be copies. 53 V. c. 30, s. 3.

*"Hour and minute":*—The provision requiring the minute to be set down in the certificate of registry precludes troublesome questions of priority from arising as to conveyances registered the same day (*k*).

*Instruments must be entered in order of receipt:*—For case of prosecution of Registrar and deputy for registering instruments out of their order, see *Reg. v. Benjamin* (*l*).

67. Every page of the registry book, and every instrument entered therein shall be numbered, and the certain year, month, day, hour and minute of registration shall be entered in the margin of the registry books, in the form of Schedule K to this Act; and the entry shall be signed by the Registrar or his deputy. R. S. O. 1887, c. 114, s. 61.

Pages and instruments to be numbered.

#### *Crown Grants.*

68. Grants from the Crown shall be registered by producing the grant or an exemplification thereof to the Registrar, with a true copy sworn to by any person who has compared the same with the original; and the copy shall be filed with the Registrar. R. S. O. 1887, c. 114, s. 62.

Crown Grants.

*Evidence of Crown grant:*—An abstract of the registries upon a lot mentioning a patent was held not sufficient evidence of the patent without producing an exemplification (*m*).

*See further notes to s-s. 2, 84 and 110.*

(*k*) See notes under section 93 *infra*.

(*l*) 4 U. C. C. P. 179.

(*m*) *Reed v. Ranks*, 10 U. C. C. P. 202 (1860); Cf. *McCollum v. Davis*, 8 U. C. R. 150; *Prince v. McLean*, 17 U. C. R. 463.

*Orders in Council.*

Orders in  
Council.

69. Orders of the Governor-General in Council or of the Lieutenant-Governor in Council may be registered in the Registry Office of the county or other registry division in which any land to which the Order in Council relates is situate, by the deposit of a copy of the Order certified by the Clerk of the Council. R. S. O. 1887, c. 114, s. 63.

*Orders in council:—See under section 2 and statutes there cited*

*Wills.*

Registra-  
tion of wills.

70. Every will shall be registered at full length by the production of the original will and the deposit of a copy thereof, with an affidavit sworn to by one of the witnesses to the will, proving the due execution thereof by the testator, or by the production of probate or letters of administration with the will annexed, or an exemplification thereof, under the seal of any Court in this Province, or in Great Britain and Ireland, or any British province, colony, or possession, or in any foreign country having jurisdiction therein, and by the deposit of a copy of the probate, letters of administration, or exemplification, with an affidavit verifying such copy. R. S. O. 1887, c. 114, s. 64.

Registra-  
tion of will  
where tes-  
tator has  
made subse-  
quent con-  
veyance of  
lands.

(2) Where the copy of a will or of letters of probate or letters of administration has attached to it, when left or offered for registry, an affidavit or statutory declaration by the executor or administrator to the effect that after making the will the testator conveyed or parted with lands in the will described by local description, and that it was not intended or desired that the registration of the will should affect such lands, and if, in addition, it appears by the registered entries respecting such lands that the testator had parted with all his interest in or title to the said lands, the Registrar shall not register, copy or enter the will as an instrument affecting such lands, nor shall he be entitled to any fees for registering and making entries and certificates in respect thereof, but shall only be entitled to the same fees in respect of the registry of such will as he would have been entitled to, had the will not contained any bequest or gift of or reference to such lands by local description. S. O. 1887, c. 30, s. 4.

(3) Where a will is registered by the production of the original will, the affidavit of the subscribing witness or some other person must state that the testator is dead, either to the knowledge of the deponent, or as he has been informed and believes. 52 V. c. 19, s. 5, s-s. 5.

*Proof of will or death*:—Section 70 provides for evidence of the death of the testator but does not seem to require proof of the testamentary capacity of the testator at the time of execution, or that the will produced is the last will and testament (*n*).

For effect of non-registration, *see* section 86, *infra*.

**71.** Letters of administration which under *The Devolution of Estates Act* affect lands, may be registered in the same manner as probates of wills are now registered, and the registrar shall be entitled to charge for registering letters of administration, without a will annexed, including all entries in respect thereof, a fee of one dollar. 51 V. c. 17, s. 5.

Registration of letters of administration. Rev. Stat. c. 108.

#### *Other Instruments.*

**72.** All instruments, other than grants from the Crown and wills, shall be registered by the deposit of the original instrument, or by the deposit of a duplicate or other original part thereof with all the necessary affidavits. R. S. O. 1887, c. 114, s. 65.

Other instruments.

[*As to Registration of Orders and Judgments for Alimony, see* R. S. O. c. 44, s. 30.]

#### *Instruments executed before the 1st January, 1866.*

**73.** The registration of all instruments executed before the first of January, 1866, may be made through memorials or by certificate or otherwise, as provided by the law in force prior to the Registry Act passed in the year 1865. R. S. O. 1887, c. 114, s. 66.

Registration of instruments executed before 1st Jan. 1866.

#### *Registration of memorials*:—*See Hart v. Appleby (o).*

**74.** The proof that would before the first day of January, 1866, have been sufficient for the registration of any instrument executed prior to the said date, shall be deemed sufficient for the registration hereafter of any such instrument; but in any such case the instrument shall be registered at full length, and the memorial and affidavit shall be deposited and filed in lieu of an original or duplicate. R. S. O. 1887, c. 114, s. 67.

Proof of registration of instruments executed before 1st Jan., 1866, etc.

(*n*) *See Doe d. Savoy v. Savoy*, 30 N. B. R. 227 (1890); *see ib.* for admissibility in evidence of certified copy of will registered but not proved. *See* further, R. S. O. c. 61, ss. 38-41; *Davis v. VanNorman*, 30 U. C. R. 437.

(*o*) 19 Gr. 205 (1872), effect of clerical error.

Registration of instruments in full when memorials previously registered.

75. (1) Any instrument which has been registered by memorial prior to the 1st day of January, 1866, and has endorsed thereon a certificate of the registration thereof, may be re-registered at full length in the same or any other Registry Division, by the production of the original instrument and the deposit of a copy thereof, with an affidavit verifying the copy.

(2) In re-registering such instrument the Registrar shall copy the affidavit of verification and the certificate of former registration, and shall write in the margin of the registry book the words "Original not deposited," and where the former registration was made in the same office, the Registrar shall write upon the entry of the memorial in the registry book a memorandum as follows:—"Re-registered in full at No. \_\_\_\_\_," giving a reference to the number and volume where the full registration is entered, and he shall also note the re-registration in red ink wherever in an abstract index the memorial is entered.

(3) The Registrar shall also endorse upon the original instrument a certificate of the re-registration, in a form similar to the certificate of registration given in Schedule J of this Act. R. S. O. 1887, c. 114, s. 68.

#### *Discharge of Mortgages.*

Satisfaction of mortgage how registered.

76. (1) Where a registered mortgage has been satisfied, the Registrar, on receiving a certificate executed by the mortgagee, or if the mortgage has been assigned and the assignment registered, then executed by the assignee, or by such other person as may be entitled by law to receive the money and to discharge the mortgage, in the form of Schedule L to this Act, or to the like effect, executed in the presence of one witness, and duly proven by the oath of the subscribing witness thereto, in the same manner as herein is provided for the proof of other instruments affecting lands, shall register the same, and every affidavit attached thereto or endorsed thereon, at full length in its proper order, in the registry book, and shall number it in like manner as other instruments are required to be registered and numbered, and shall write in the margin of the register wherein the said mortgage has been registered, words to the following effect:

Entry in margin of register.

"\_\_\_\_\_*See certificate purporting to be discharge signed by*  
\_\_\_\_\_*(naming the person who has executed the same),*  
*and see Registry number—of such certificate—Book (stating the same according to the fact),*" and to such marginal entry the Registrar or his Deputy shall affix his name; and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor. R. S. O. 1887, c. 114, s. 69.

Effect of such registration.

(2) In any case where a mortgage shall hereafter be paid off by any person advancing money by way of a new loan on mortgage on the same property and the mortgage so paid off or the discharge thereof is held by the mortgagee making the new loan or advance, the discharge of the mortgage so paid off shall be registered within six months from the date thereof, unless the mortgagor shall, in writing, have authorized the retention of the said discharge for a longer period. Such registration shall not affect the right (if any) of any mortgagee or purchaser who may have paid off such mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid.

Registration of discharge when mortgage paid off by new loan.

*Nature of statutory discharge of mortgage* :—"It is scarcely necessary to observe that the statutory discharge of mortgage is a very peculiar instrument. Having no effect upon the legal estate before registration, by that Act it may be made to operate upon it, and in the case of a deceased mortgagee although it is executed by his personal representatives in whom the legal estate never vested. It was early introduced into the law of the Province, as part of the machinery for transferring real estate "(p).

"*Entitled by law to receive the money*" :—In the above case of *Dilke v. Douglas*, Moss, C.J., after reviewing the legislation on the subject of the statutory discharge goes on to say :—

"We have referred to these various statutes because it appears to us that there runs through them a steady policy of enabling the person, or even one of the persons, entitled to receive the mortgage debt, to discharge the mortgage and restore the legal estate."

*No necessity to go behind discharge and inquire as to actual payment* :—Referring to the same doctrine as in the preceding paragraph his Lordship continues :—

"In my opinion this doctrine should be rigidly maintained in a country where the system of real property law

(p) Moss C.J.A., in *Dilke v. Douglas*, 5 A. R. 63 (1880). For history of legislation on this subject see *ib.*



has taught the people at large to place great reliance upon the state of the registered title. To pronounce that the purchasers in this case were bound to inquire whether payment in money had actually been made, would be practically to neutralize the statutory provision sanctioning payment to a survivor."

*Discharge does not operate as a reconveyance until registered*:—What is tantamount to a reconveyance is the certificate and the registration thereof. Until registered, the discharge is only a receipt for so much money and leaves the legal estate vested in the mortgagee and his representatives; nor does it release the mortgagor from any of his covenants (*q*).

There are a number of cases in the reports as to the duty of the registrar in recording discharges. He has been held bound to register a discharge of part of the land contained in a mortgage (*r*); but not to register a single discharge of two mortgages (*s*). A discharge which, (though the registrar properly might refuse to register it), has nevertheless been registered, is valid as a reconveyance (*t*). The certificate of the registrar that the mortgage has been discharged, endorsed on the mortgage deed was held sufficient evidence of reconveyance without proving the execution of the discharge itself (*u*).

As to the effect of errors or omissions in the executed certificate of discharge: it has been considered that the entire omission of the payer's name would not invalidate the discharge (*v*); nor would the alteration of an incorrect

(*q*) *Trust & Loan Co. v. Gallagher* 3 P. R. 100 (1879); *Re Music Hall Block*, 8 O. R. 228 (1884).

(*r*) *In re Ridout*, 2 U. C. C. P. 477 (1853).

(*s*) *In re Smith & Shenston*, 31 U. C. R. 305 (1871).

(*t*) *Magrath v. Todd*, 26 U. C. R. 87 (1366), distinguishing *Robson v. Wadell*, 24 U. C. R. 574 (1864).

(*u*) *Doe d. Crookshank v. Humberstone*, 6 O. S. 103 (1841).

(*v*) *Carriek v. Smith*, 35 U. C. R. 348 (1874). See *Macauley v. Boyle*, 25 U. C. C. P. 239.

date (*w*); nor the lack of particulars as to dates and parties to an assignment recited in the discharge (*x*). The reference to an instrument as '5764' instead of '5764 C. W.' or to a person as 'Elizabeth instead of Eliza' is immaterial (*y*).

Sub-section 2 is something new and salutary (*z*). A practice has sprung up in loan companies, when paying off existing incumbrances out of the loan to mortgagor, to take discharges for those incumbrances and file them not in the Registry Office but in the Loan Company's office (*a*). The object of this practice is, of course, that the Company in case of necessity may obtain an assignment of the incumbrances paid off and thus be subrogated to the rights of the original incumbrancers; there being danger that such right of subrogation would be lost if the discharges were registered forthwith. Such a practice is (or was) convenient to the loan companies but unfair to the mortgagor whose title is kept in suspense and subjected to the risk of the discharges being mislaid or lost. The present section removes the excuse for the retention of discharges by providing that their registration shall not affect any right of subrogation.

*"Shall be registered"*:—This is not very happily worded and there is no penalty imposed for non-registration within the six months; but presumably the intention is that an action should lie after six months, at the instance of the owner of the equity, to compel registration.

*Subrogation to the rights of mortgagee paid off*:—It seems that even before the passing of this sub-section in

(*w*) *Sayles v. Brown*, 28 Gr. 10 (1880).

(*x*) *Re Mara*, 16 O. R. 391 (1888).

(*y*) *Re Clarke and Chamberlain*, 18 O. R. 270 (1889).

(*z*) But see 14 C. L. T. 40.

(*a*) This practice is suggested in the case of *Trust & Loan Co. v. Gallagher*, 8 P. R. 100 (1879).

*bona fide* cases of mistake a subsequent mortgagee or purchaser might claim to be subrogated to the rights of a mortgagee whose incumbrance he had discharged. *Abell v. Morrison* (b) is an instructive case of this sort, the facts being as follows:—G. M. searched on the 18th day of the month intending to purchase M. M's lands; on the 19th A. sold an engine and registered a lien therefor on M. M's lands; on the 24th G. M. without again searching paid off the prior mortgages out of money borrowed by him on a fresh mortgage of the land and accepted a deed of conveyance to himself, thus carrying out his purchase; and on the following day he registered the two discharges and his deed and his subsequent mortgage.

On this state of facts, Falconbridge J., said: "The principal contest was as to G. M's claim to be subrogated to the rights of the incumbrancers whose claims he paid.

"I find as a fact that at the time of the sale and conveyance to him he had no notice or knowledge of the agreement between the plaintiff and the other defendants. I find that he paid his money and discharged the prior mortgages under the mistaken belief that he was getting a good title in fee simple unencumbered, and to adopt the language of my brother Street in *Brown v. McLean*, 18 O. R. 533, 'that he is not disentitled to relief by reason of the fact that by using ordinary care' (in this case by a subsequent search in the Registry Office) 'he might have discovered the defendant's execution, because the defendant has not been in any way prejudiced by the mistake.'"

To a like effect is the decision of Boyd, C., who concludes: "I do not feel compelled as a conclusion of law to say that this defendant had notice of what he was doing, and so cannot plead mistake. He has proved mistake and

(b) 19 O. R. 669 (1890).

has brought himself within the equitable doctrine which resuscitates the discharged mortgages for his advantage" (c).

77. (1) It shall not be necessary to the validity of any certificate of discharge of mortgage given by a married woman that the husband of such married woman should be a party to or should execute the same; and it is hereby declared that any discharge of mortgage heretofore executed by a married woman alone (and duly registered) shall be as effectual to discharge such mortgage and to re-convey all the estate of such married woman in the mortgaged lands as if the same had been executed by the husband and wife jointly.

How mortgages to married women discharged.

(2) Any such certificate given between the 19th day of December, 1863, and the 29th day of March, 1873, shall be deemed to have been sufficiently executed if it has been executed jointly by such married woman and her husband; and from and after the 29th day of March, 1873, and after the passing of this Act, execution, either jointly by the married woman and her husband, or pursuant to *The Married Woman's Real Estate Act*, shall be deemed sufficient execution; and it shall not be necessary to produce any certificate of such married woman having been examined before any of the persons authorized by the laws in force between said dates touching her consent thereto in anywise. R. S. O. 1887, c. 114, s. 70.

Mode of execution by married women.

Rev. Stat. c. 134.

"*Executed jointly*":—As to what constitutes execution by married woman jointly with her husband, see *Burns v. McAdam* (d), *Monk v. Furlinger* (e).

78. All certificates of discharge of mortgage and the registering thereof executed by married women or registered previously to the nineteenth day of December, 1863, according to the terms of the Act passed in the thirty-second year of Her Majesty's reign, and chaptered nine, shall be as valid and binding as if done after the said date. R. S. O. 1887, c. 114, s. 71.

All discharges of mortgage by married women before 19th Dec., 1863, confirmed. 32 V. c. 9.

79. In case the mortgagee or any assignee of the mortgagee desires to release or discharge part only of the lands contained in such mortgage, or to release or discharge only part of the money specified in the mortgage, he may do so by deed or by

Release of part only of lands mortgaged.

(c) Citing *Brown v. McLean*, 18 O. R. 533; *Trust & Loan Co. v. Cuthbert*, 14 Gr. 410; *Cobb v. Dyer*, 19 Me. 494.

(a) 24 U. C. R. 449 (1865).

(e) 17 U. C. C. P. 41 (1866).

- a certificate to be made, executed, proven, and registered in the same manner as in cases where the whole lands and mortgage are wholly released and discharged; and such deed or certificate shall contain as precise a description of the portion of lands so released or discharged as would be necessary to be contained in an instrument of conveyance for registration under this Act, and also a precise statement of the amount or particular sum or sums so released or discharged. R. S. O. 1887, c. 114, s. 72.
- Portion released to be described. 80. (1) When a sheriff, bailiff of a Division Court or other officer, under a writ or warrant of execution against goods, seizes any mortgage belonging to the person against whose effects the writ or warrant has issued, on or affecting land in the Province of Ontario, the payment with or without suit in whole or in part to the sheriff, bailiff, or other officer by the mortgagor or any other person of the mortgage money thereby secured shall discharge the mortgage to the extent of such payment.
- Discharge of mortgage seized under execution. (2) After payment of the mortgage or any part thereof, the sheriff, bailiff, or other officer shall, at the request and expense of the person requiring the same, give a certificate in the form or to the effect of Schedule M to this Act, under the hand and seal of office of the sheriff or other officer, or under the hand of the bailiff, and the seal of the Court of which he is bailiff.
- Form of certificate of discharge. (3) Upon the written request of the bailiff the clerk of the Court shall affix to the certificate the seal of the Court; and he shall file the request of the bailiff in his office.
- Seal of Court. (4) The execution of the certificate shall be proved by the same oath or affirmation, and in the same manner as is provided by law for the proof for registration of other instruments affecting lands, and the certificate shall be registered in the same manner as other certificates of discharge of mortgages are registered.
- Proof of execution of certificate. (5) Every certificate so registered, if the same is of payment in full of the mortgage, shall be as valid and effectual in law as a release of the mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor as if executed by the execution debtor.
- Effect of certificate. (6) Every certificate so registered, if the same is of payment of only a portion of the mortgage, shall be as valid and effectual in law as a release of the mortgage as to such portion, as if executed by the execution debtor.
- Effect of certificate of part payment. (7) The provisions of this section shall extend and apply to all cases in which the seizure or payment was before, or since the twenty-first day of December, 1874. R. S. O. 1887, c. 114, s. 72.
- Retro-spective operation.

For cases on mortgages seized in execution, see *Howes v. Lee (f)*, *Lee v. Howes (g)*, *Woodruff v. Mills (h)*, *Stewart v. Clark (i)*, *Heward v. Wolfenden (j)*, *Smith v. Bernie (k)*, *Pegge v. Metcalfe (l)*.

81. It shall not be necessary that the residence or occupation of the attesting witness to any certificate of discharge of mortgage be stated in the attestation clause thereof: nor shall any such certificate, registered before the twenty-ninth day of March, 1873, be invalid or inoperative by reason of the omission to state in the attestation clause the residence or occupation of such attesting witness. R. S. O. 1887, c. 114, s. 74.

Residence, etc., of witness to discharge of mortgage need not be given in attesting clause.

For application of section 81, see *Stoddart v. Stoddart (m)*.

82. Instruments of the nature mentioned in section 43 of this Act, registered before as well as after the passing hereof, may be discharged, and the lands affected thereby released therefrom by filing in the registry office a certificate of discharge in the form contained in Schedule N. to this Act, or to the like effect. 51 V. c. 17, s. 3.

Discharge of instrument given in relation to purchase of goods.

See section 85 *infra* for priority of such an instrument.

#### BY-LAWS, ETC.

83. (1) Every by-law passed since the twenty-ninth day of March, 1873, or hereafter to be passed by any municipal council under the authority of which any street, road, or highway has been or is opened upon any private property, shall before the same becomes effectual in law, be duly registered in the registry office of the registry division in which the land is situate; and for the purpose of registration a duplicate original of the by-law shall be made out, certified under the hand of the clerk and the seal of the municipality, and shall be registered without any further proof.

Registration of by-laws passed since 29th March, 1873.

(f) 17 Gr. 459 (1870), sale by sheriff under invalid writ.

(g) 30 U. C. R. 292 (1870).

(h) 20 U. C. R. 51 (1860), purchase by mortgagee. Cf. *Smart v. Cottle*, 10 Gr. 59 (1863).

(i) 17 U. C. C. P. 203 (1863), sale of equity under *f. fa.* does not release mortgagor or surety.

(j) 14 Gr. 188 (1868), can there be a sheriff's sale of part of mortgaged property.

(k) 10 U. C. C. P. 243 (1860).

(l) 5 Gr. 628 (1856), purchase by judgment creditor.

(m) 39 U. C. R. 203 (1876).

As to by-laws, etc., relating to roads made before 29th March, 1873.

(2) Every by-law passed before the said day, and every order and resolution of the Quarter and General Sessions passed before the said day under the authority of which any street, road, or highway, has been opened upon any private property, may at the election of any party interested and at the cost and charges of such party or municipality, be also duly registered, upon the production to the Registrar of a duly certified copy of the by-law under the hand of the clerk of the municipality and the seal of the municipality, or by a duly certified copy of the order or resolution of the Quarter or General Sessions, given under the hand and seal of the Clerk of the Peace, as the case may be. R. S. O. 1887, c. 114, s. 75.

By-laws, etc., affecting changes in municipal boundaries.

(3) All by-laws, proclamations, Orders in Council and other instruments of a public, or *quasi* public nature whereby a village, town or city becomes incorporated, or the boundaries of any municipality are enlarged, diminished or in any way altered, shall be registered in the proper registry office by the municipality passing or procuring the same, and a copy of a by-law certified by the seal of the corporation and the signature of the chief officer and the clerk thereof, and a copy of a proclamation, Order in Council or other instrument certified by the chief officer of the department from which the same is issued shall be sufficient proof for registration purposes under this section.

For operation of section 83, see *Beveridge v. Creelman* (n); cf. *Dunlop v. Township of York* (o).

#### EFFECT OF REGISTERING OR OMITTING TO REGISTER.

Unregistered instruments after grant from the Crown to be void against subsequent registered purchaser or mortgagee.

84. After any grant from the Crown of lands in Ontario, and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, in the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims. R. S. O. 1887, c. 114, s. 76.

*Law previous to section 84*:—Previously to section 84, which was enacted by 13 and 14 V. c. 63 (p), the registry

(n) 42 U. C. R. 29 (1877), section not retrospective.

(o) 16 Gr. 216 (1869), right of registered incumbrancer in expropriation money.

(p) Taking effect on instruments executed since 1st January, 1851, see *Campbell v. Campbell*, 6 Gr. 609 (1858).



laws had no operation until the title became a registered title (*q*); it was necessary to give evidence shewing that the title was a registered one before the Act could be held applicable (*r*).

"*After any grant from the Crown*":—The registry Acts do not apply to instruments executed previously to the grant from the Crown (*s*). But any one having a mortgage incumbrance or lien on unpatented lands may register the same (*t*); except in the case of grants under *The Free Grants and Homesteads Act*, which expressly negatives any power in the locatee to alienate (otherwise than by devise), or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent (*u*).

*Notice of alienation of unpatented lands*:—Express notice of an unregistered assignment of unpatented lands has the like effect with express notice of an unregistered conveyance after patent issued (*v*).

Registration of a mortgage of unpatented lands is notice to subsequent purchasers, whether the patent has issued under or without a decision of the Heir and Devisee Commission (*w*).

*Valuable consideration must be proved*:—It seems that in order to claim the benefit of this section the subsequent

(*q*) *Campbell v. Fox*, 26 U. C. R. 631 (1867); *Cf. Van Sickler v. Pettet*, 5 L. J. 41, 164; *Scott v. McLeod*, 14 U. C. R. 574; *Doe d. Mallock v. Ducher*, 4 U. C. R. 14; *Doe d. Shibley v. Waldron*, 2 U. C. C. P. 189; *Doe d. Adkins v. Atkinson*, 4 O. S. 140; *Doe d. Hennessey v. Meyers*, 2 O. S. 424.

(*r*) *Neeson v. Eastwood*, 4 U. C. R. 271; *Blakely v. Garrett*, 16 U. C. R. 261.

(*s*) *Casey v. Jordan*, 5 Gr. 467 (1856). Case of locatee giving bond and subsequently conveying.

(*t*) R. S. O. 1887, c. 27, s. 27; *Holland v. Moore*, 12 Gr. 298 (1866). See also R. S. O. 1887, c. 24, s. 17.

(*u*) R. S. O. 1887, c. 25, s. 16.

(*v*) *Goff v. Lister*, 13 Gr. 406; 14 Gr. 451 (1868).

(*w*) *Vanse v. Cummings*, 13 Gr. 25 (1867).

purchaser or mortgagee must *prove* the valuable consideration. Thus in *Barber v. McKay* (x), Boyd, C., says:—

“Where priority is sought under the Registry Act for a conveyance subsequent in date, it is essential that proof of valuable consideration should be given. For this purpose the mere production or registration of the instrument is not enough, and no inference to this effect can be reasonably drawn from the provisions referred to by the plaintiff: s. 57 of the Registry Act, R. S. O. c. 114, and ss. 44 and 45 of the Evidence Act, R. S. O. c. 61. In some cases the legislature has relaxed this rule, and in the case of defence of purchaser for value, R. S. O. c. 100, s. 36, and in case of a subsequent purchaser, c. 100, s. 6. . . . The plaintiff here fails, because, relying upon the registry laws to give priority to the deed under which he claims, he has failed to prove the consideration, and it is not suggested that the difficulty could be remedied by opening up the matter for further trial.”

*How far receipt in deed is proof of valuable consideration*:—To put the subsequent deed itself in as evidence will not suffice to prove the valuable consideration unless the deed is put in by the opposite party and not the party seeking to establish his priority under this section. This distinction is observed in the above case of *Barber v. McKay* (y): “The deed relied upon by the plaintiff as giving him priority by virtue of its prior registration is expressed to be for \$450, and was put in by himself; had it been called for and put in by the defendant the plaintiff might have invoked *Bondy v. Fox*, 29 U. C. R. 64, as dispensing

(x) 19 O. R. 46 (1890), citing *McKenny v. Arner*, 8 U. C. C. P. 46. See also *Doe d. Major v. Reynolds*, 2 U. C. R. 311; *Doe d. Russell v. Hodgkiss*, 5 U. C. R. 348; *Doe d. Prince v. Girty*, 9 U. C. R. 41; *Leech v. Leech*, 24 U. C. R. 321; *Fraser v. Sutherland*, 2 Gr. 412, mortgage to creditors, also *Neeson v. Eastwood*, 4 U. C. R. 271, but see *Collver v. Shaw*, 19 Gr. 599; *Wilkinson v. Conklin*, 10 U. C. C. P. 211; *Miller v. McGill*, 24 U. C. R. 577, nominal consideration; *Dumble v. Johnson*, 17 U. C. C. P. 9.

(y) *Ib.* distinguishing also *Canada Permanent Loan & Savings Co. v. Page*, 30 U. C. C. P. 1. See *Baldwin v. Dingnan*, 6 Gr. 595.

with further proof of value. . . . There is no evidence of value as against a stranger, from the fact that the deed put in evidence by the plaintiff appears to be for \$450, and has the usual receipt thereon. This was laid down in *Doe d. Cronk, etc., v. Smith*, 7 U. C. R. 376, a case that has always been followed: *Blackburn v. Gummerson*, 8 Gr. at p. 334."

"Without actual notice":—"The cases clearly establish that to defeat a registered deed there must be actual notice (z) or fraud.

"The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice (a). In the absence of actual notice therefore to the principal or his agent, and of fraud, it has been held that a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendors, but were in the hands of certain other persons, but abstained from inquiry" (b).

*Prior registration of mortgage gives priority to power of sale*:—It has been decided that the prior registration of a mortgage with a power of sale enabled the mortgagee, in the proper exercise of such power, to sell free from the claim of a purchaser under a prior unregistered conveyance (c).

*Purchaser with notice from purchaser without notice*:—"If anything can be well settled it is that one who for

(z) Actual notice defeats priority by registration. See *Puchard v. Tompkins*, 31 W. R. 286, also notes to sections 94 and 95 *infra*.

(a) Cf. *Agra Bank v. Barry*, L. R. 7 H. L. 135; *Lee v. Clutton*, 33 L. T. 717; 35 L. T. 84.

(b) *Ritchie, C.J.*, in *Ross v. Hunter*, 7 S. C. R. 305 (1882). See *Hollywood v. Waters*, 6 Gr. 329 (1857), as to sufficient evidence of notice. Cf. *McLennan v. McDonald*, 18 Gr. 502 (1871). *Doe d. Pell v. Mitchener*, Dra. 471, *Jolland v. Stambridge*, 3 Ves. 478, as to fraud; *Norcross v. Widgey*, 2 Mass. 506, fraud in second grantee must be clearly proved; *Bennetto v. Holden*, 21 Gr. 222, misrepresentation by grantor. For application of Act to railway companies, see *Harty v. Appleby*, 19 Gr. 205, *Regina v. Smith*, 43 U. C. R. 369.

(c) *Daniels v. Davidson*, 9 Gr. 173 (1862).

valuable consideration acquires title from a purchaser or mortgagee, who has himself gained priority under the registry laws over a former unregistered deed or mortgage, is entitled to the benefit of the priority so acquired, even though such sub-purchaser or mortgagee may himself have had notice; in such case he is entitled to shelter himself under the valid preferable title of his own immediate grantor.

"So that if A. takes a mortgage and does not register, and then B. takes a mortgage of the same lands and acquires priority over A. by registering without notice, C., obtaining for valuable consideration an assignment of B.'s mortgage, though with notice of A.'s prior mortgage, is nevertheless entitled to the benefit of the priority acquired by his assignor, B. Nothing can be better established than this, the principle being the same as that which always applied in equity to the case of a purchaser with notice from a *bona fide* purchaser for value without notice" (d).

*To what relief subsequent purchaser entitled:*—By the words of this section the subsequent purchaser or mortgagee is entitled to have the prior deed adjudged fraudulent and void as against his own deed or to a decree declaring the priority of his own deed (e). But there is some doubt as to his ability to maintain an action to have the registration of the other deed vacated or that deed itself cancelled. This doubt pervades the decision in *Weir v. Niagara Grape Co.* (f), where Armour, C.J., says:—

(d) Strong, J., in *Gray v. Coughlin*, 18 S. C. R. 568 (1891), reversing 16 A. R. 224. Cf. *Ferrass v. Macdonald*, 5 Gr. 310. See *Doe d. Nellis v. Matlock*, 2 O. S. 487, conveyance to third party without notice of fraud of subsequent purchaser.

(e) *Weir v. Niagara Grape Co.*, 11 O. R. 700 (1886). See *Buchanan v. Campbell*, 14 Gr. 163.

(f) *Ib.* The relief granted in this case was granted only conditionally. See *Gibbs v. Sidney*, 49 L. T. N. S. 132, as to jurisdiction of judge of High Court.

"If the plaintiff is entitled to relief, then if A. makes a mortgage to B. on the first of the month and another to C. on the tenth of the same month, and C. registers his mortgage, and subsequently B. registers his, and C. has no actual notice of B.'s mortgage, C. will be entitled to maintain a bill to vacate the registry of B.'s mortgage, because it is by the Registry Act to be adjudged fraudulent and void as against him, and being of a prior date to his mortgage, it causes him embarrassment in disposing of his mortgage.

"I have been able to discover no authority binding us to grant the relief asked for here, and but for the strong expressions of opinion of the learned Vice-Chancellor in *Truesdell v. Cook* (g), concurred in and approved by the learned Chancellor in *Dynes v. Bates* (h), I should have thought it ought to be refused; but I think we ought to defer to those opinions, leaving the question to be settled by an appellate Court."

*Tendency of Courts as to priority of registration:—*

"I entertain a very strong opinion, from a long experience of the legal business of the country, that a stringent observance of the Registry Law, except in cases of actual moral fraud, is beyond question the wisest rule in the disposition of property.

"I think the modern cases exhibit an increasing desire not to allow priority of registration to be lightly interfered with, and also to abandon as untenable some grounds which found favour in the sight of very learned judges in earlier years" (i).

*Vendor does not complete title until registration:—*

"The abstract has not been left with me, but it could not have shewn the registry of the deed in question prior to

(g) 18 Gr. 532.

(h) 25 Gr. 593.

(i) Hagarty, C.J., in *Peterkin v. McFarlane*, 9 A.R. 443 (1884).

the 12th May, and the decision in *Brady v. Walls*, 17 Gr. 699, is that the Vendor does not complete title until deed registered, *i.e.* that registration is essential to the title" (j).

*Effect of indefinite description on priority* :—See *Reid v. Whitehead* (k); *Severn v. McLellan* (l).

*Pleading priority of registration* :—See *Carlisle v. Whaley* (m).

*Registry required for other purposes than to preserve priority* :—As to registration of bargain and sale, see p. 53, *supra*. For requirement in cases of lands purchased by religious institutions, see R. S. O. 1887, c. 237, ss. 19 & 20; and cf. *Doe d. Bowman v. Cameron* (n).

For further treatment of subject of priority, see notes under sections 94, 95, *infra*.

Instruments giving authority to sell and naming commission, not to bind land after one year from date.

85. Every instrument within the meaning of section 2 of this Act, which in its nature is, or purports to be, a power of attorney or authority from one person to another to sell lands, and in which instrument the commission, payment for services, or other remuneration of the attorney or agent therein named, is made a charge on the land, shall not, as against a subsequent purchaser, or the creditors of the person giving the power or authority, have effect to charge the lands with such commission, payment for services, or remuneration, after the lapse of the time hereinafter mentioned, namely :—(1) after the lapse of one year from the making of the instrument, where the same is made or executed after the passing of this Act; (2) after the lapse of one year from the passing of this Act, where the instrument has been heretofore made or executed. 51 V. c. 17, s. 2.

See sections 43 and 82, *supra*.

(j) *Laird v. Paton*, 7 O. R. 141 (1884). See *Kitchen v. Murray*, 16 U. C. C. P. 69.

(k) 10 Gr. 446; 2 E. & A. 580 (1865).

(l) 19 Gr. 220 (1872), actual notice of unregistered deed of unascertained portion of property.

(m) L. R. 2 H. L. 391, case where registration effected after action brought.

(n) 4 U. C. R. 155. See also *re Baptist Church Property of Stratford*, 2 Chy. Ch. 388.

86. All wills or the probates thereof registered within the space of twelve months next after the death of the testator or testatrix, shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had been registered immediately after such death; and in case the devisee, or person interested in the lands devised in any such will, is disabled from registering the same within the said time by reason of the con- testing of such will or by any other inevitable difficulty without his or her wilful neglect or default, then, the registration of the same within the space of twelve months next after his attain- ment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of this Act. R. S. O. 1887, c. 114, s. 77.

Wills to be registered within 12 months from death of tes- tator.

"*Subsequent purchasers and mortgagees*":—These must be purchasers or mortgagees for a valuable (not necessarily a money) consideration (*o*).

For case where heir forged deeds to mortgagees who registered and claimed priority over unregistered will, see *Re Cooper, Cooper v. Vesey* (*p*).

"*Other inevitable difficulty*":—Infancy is not an inevi- table difficulty (*q*). As to will executed abroad, see *Doe d. Eberts v. Wilson* (*r*); see further, *Re Davis* (*s*); *Stephens v. Simpson* (*t*).

See further, under sections 2, 70 and 71, *supra*.

87. Every deed made by a treasurer or other officer for arrears of taxes shall be registered within eighteen months after the sale by such treasurer or other officer; and all deeds of lands sold under process issued from any Court in Ontario, shall be registered within six months after the sale of the lands; other- wise the parties respectively claiming under any of such sales, shall not be deemed to have preserved their priority as against a purchaser in good faith who has registered his deed prior to the registration of the deed from the treasurer or other officer. R. S. O. 1887, c. 114, s. 78. See also 55 V. c. 48, s. 184.

Registry of deeds on sales for tax- es and sales under pro- cess of Court.

(*o*) *Bondy v. Fox*, 29 U. C. R. 64 (1869). See also *Stephen v. Simpson*, 15 Gr. 594; *Rykert v. Miller*, 14 Gr. 25 (1867); *Wilkinson v. Conklin*, 10 U. C. C. P. 211.

(*p*) 20 Ch. D. 611 (1882).

(*q*) *Manderville v. Nicholl*, 16 U. C. R. 609 (1859); cf. *McLeod v. Truax*, 5 O. S. 455.

(*r*) 4 U. C. R. 386.

(*s*) 27 Gr. 199 (1880).

(*t*) 12 Gr. 493; 15 Gr. 594 (1869).



*"Sold under process:—See Doe d. Brennan v. O'Neill(u); Burnham v. Daly(v); Moffatt v. Grover(w); Rathbun v. Culbertson(x); Bruyere v. Knox(y).*

Sales for  
taxes before  
4th March,  
1868.

88. Where deeds for lands sold for taxes, or under process of law, before the fourth day of March, 1868, have not been registered within one year after the said day, the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who has acquired priority of registration. R. S. O. 1887, c. 114, s. 79.

*Operation of section 88:—See Jones v. Cowden(z).*

Registry  
to be notice.

89. The registration of any instrument, under this Act, or any former Act, shall constitute notice of the instrument, to all persons claiming any interest in the lands, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall continue to be the duty of every Registrar not to register any instrument, except on such proof as is required by this Act. R. S. O. 1887, c. 114, s. 80.

*Registry to be notice:—Registration was not notice until 13 & 14 V. c. 63 (a), which enactment affected instruments registered before as well as since its passing (b).*

*Principle on which registry is deemed notice:—"I think that the statute proceeds upon this, that a party acquiring land ought to see whether there is anything registered against that which he is about to acquire; and that he is to be assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but parting with an interest in lands" (c).*

(u) 4 U. C. R. 8; cf. *Waters v. Shade*, 2 Cr. 457.

(v) 11 U. C. R. 211; cf. *Smith v. Brown*, 14 U. C. R. 12.

(w) 4 U. C. C. P. 402.

(x) 22 Gr. 465 (1875). *Sheriffs' deeds not referring to plan of sub-division.*

(y) 8 U. C. C. P. 520.

(z) 34 U. C. R. 345 (1874). See also *Carroll v. Burgess*, 40 U. C. R. 381; *Peck v. Bucke*, 2 Chy. Ch. R. 294.

(a) Section 8. See *Street v. Commercial Bank*, 1 E. & A. 246; 1 Gr. 169. See *Kay v. Wilson*, 24 Gr. 212.

(b) *Vance v. Cummings*, 13 Gr. 25.

(c) *Trust & Loan Co. v. Shaw*, 16 Gr. 446 (1869). Cf. *Bank of Montreal v. Baker*, 9 Gr. 301.

*Registry is constructive notice only to after purchasers :—See Bates v. Norcross (d).*

*Is the presumption of notice under this section absolute?—*"The Registry Act which declares (section 80) that registration shall constitute notice does not preclude inquiry as to whether there was knowledge in fact, and the Act itself (section 82) makes the distinction between actual notice and the implied or imputed notice which in certain cases flows from registration" (e).

*Scope of notice under this section :—*Notice may be imputed not merely of the contents of registered deeds, but of the real intention and effect of those deeds as explained by subsequent instruments. Thus where there had been a conveyance absolute in form, a redemption suit and decree, and a reconveyance by the mortgagee, Street, J., said, "The defendant, however, is clearly affected under the Registry Acts with notice that M. was a mortgagee only and that K. & Co., who redeemed him did so in the character of owners of the equity of redemption" (f).

*Any interest in the lands :—*This section was held to apply even to a case where the only interest claimed in the lands was to have a mortgage charged thereon in ease of other lands purchased; so that the purchaser was held bound with notice of any instrument registered against the lands he sought to charge (g).

*Does section 89 affect the covenant against incumbrances?—*Though prior conveyances were registered and their registration might therefore be notice to the covenantee

(d) 14 Pick. 224.

(e) Abell v. Morrison, 19 O. R. 669 (1890), Boyd, C.

(f) McKay v. Bruce 20 O. R. 718 (1891). Cf. Merchants' Bank v. Morrison, 18 Gr. 382, 19 Gr. 1; Bell v. Walker, 20 Gr. 558; Haynes v. Gillen, 21 Gr. 15; Gilleland v. Wadsworth, 1 A. R. 82, 23 Gr. 547; Menzies v. Kennedy, 23 Gr. 360.

(g) Clark v. Bogart, 27 Gr. 455 (1880), Blake, V.C.

yet such knowledge would not prevent him recovering on the covenant against incumbrances (*h*).

Retro-  
spective  
operation of  
last section.

90. So far as by the last preceding section it is provided that notwithstanding any defect in the proof for registration the registration of an instrument shall constitute notice thereof, the said section shall only apply retrospectively from the twenty-ninth day of March, 1873, as to matters and facts within the meaning of section 45 of this Act. R. S. O. 1887, c. 114, s. 81.

*Notwithstanding any defect in the proof*:—This proviso as to defects was introduced by 36 V. c. 17, s. 6, assented to 29th March, 1873. See *Magrath v. Todd* (*i*).

Entries in  
index and  
corrections.

91. (1) After an instrument has been entered in the abstract and alphabetical books, and has been copied in the registry book, no entry shall be made in the abstract index or in the alphabetical index respecting such instrument, except in the manner hereinafter provided; nor, except in such manner, shall any alteration or correction be made in any entry previously made respecting any instrument, or in any copy of any instrument in any registry book.

(2) The registrar or his deputy shall as promptly as possible after becoming aware of any omission or error in copying, cause the entries, alterations or corrections which are requisite, to be made in red ink; and a memorandum stating the date of such entry, alteration or correction shall be made in red ink in the margin of the index or registry book opposite or near thereto; and such memorandum shall be signed by the Registrar or his deputy. 52 V. c. 19, s. 3.

Penalty  
for unauth-  
orized alter-  
ation of  
entries.

92. An person (other than the Registrar or other officer when he is entitled by law so to do), who alters any of the books, records, plans or registered instruments in any registry office, or makes any memorandum, words or figures in writing thereon, and whether in pencil or in ink, or by any other means, or in any way adds to or takes from the contents of such book, record, plan or registered instrument, shall, on summary conviction therefor, before a justice of the peace,

(*h*) *Platt v. Grand Trunk Ry. Co.*, 12 O. R. 134 (1886).

(*i*) 26 U. C. R. 87 (1866), affidavit not stating place of execution; distinguishing *Robson v. Waddell*, 24 U. C. R. 574, where addition of witness omitted; cf. *Campbell v. Fox*, 26 U. C. R. 631 (1867), defective registration followed by re-registration; *Jones v. Cowden*, 34 U. C. R. 345 (1874), execution by sheriff of deed after he had gone out of office; *Lawrie v. Rathbun*, 38 U. C. R. 255 (1879), omission to enter in abstract index, how far a defect. See also under sections 44 and 45, *supra*.

forfeit and pay a penalty of not less than \$5, and not more than \$100 besides the costs, and in default of payment thereof, he shall be imprisoned in the county gaol of the county in which the offence was committed for a period of not less than three months, and to be kept at hard labour in the discretion of the convicting justice.

93. Every instrument capable of registration and having the proper affidavit of execution attached thereto, shall be deemed to be registered when and so soon as the same is delivered either personally or by letter to and received at his office during office hours by the registrar or some officer or clerk in his office on his behalf, and a tender or payment made of the proper fees therefor, and thereafter no alteration shall be made by any person whatever in such instrument, and any person altering the same shall be deemed to be guilty of the violation provided for by the preceding section, and may be punished in like manner as therein provided.

When instruments to be deemed registered.

*Receipt by Registrar constitutes registry*:—This confirms what was the practice. Thus, in *Armour on Titles* we find the following statement: "As a matter of practice registration is always considered complete when the instrument has been received by the Registrar. It is the universal practice amongst conveyancers, having regard to the fact that a purchaser is affected by notice at any time before registration (*j*), not to pay over purchase money until after delivery of the instrument to the Registrar; but after such delivery payment is considered to be safe" (*k*).

*Where two instruments received on same day*:—In *Neve v. Pennell* (*l*), two instruments were registered on the same day and at the same hour; one was numbered 764, the other 768. It was held that that numbered 764 must be regarded as having been registered first. In practice it is now obligatory to note also the minute as well as the hour of registry, so that such a case can hardly again arise (*m*).

(*j*) See *Miller v. Smith*, 23 U. C. C. P. 47.

(*k*) At p. 55. See *Doe d. McLean v. Manahan*, 1 U. C. R. 491; *Doe d. Russell v. Gillett*, Rob. & Jos. 3284.

(*l*) 9 L. T. N. S. 285. Cf. *Wiseman v. Westland*, 1 Y. & J. 117.

(*m*) See section 66, *supra*.

Actual  
notice.

94. Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration. R. S. O. 1887, c. 114, s. 82.

As to  
liens, etc.

95. No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act. R. S. O. 1887, c. 114, s. 83.

Tacking.

*Actual notice, what is it?*—The case of *Rose v. Peterkin* (n) deals very fully with the question of priority and notice, actual and otherwise; and we cannot do better than give some extracts from the judgments in that case:

“For the purpose of postponing a registered instrument, Courts of Equity, except in the instance of a single decision which I will presently refer to, have always required actual and direct, as distinguished from merely constructive notice. What such actual and direct notice is, may well be ascertained very shortly by defining constructive notice, and then taking actual notice to be knowledge not presumed as in the case of constructive notice, but shewn to be actually brought home to the party to be charged with it; either by proof of his own admission; or by the evidence of witnesses who are able to establish that the very fact, of which notice is to be established, not something which would have led to the discovery of the fact if any inquiry had been pursued, was brought to his knowledge. In *Jones v. Smith* (o) Sir James Wigram, V.C., there says that constructive notice occurs in the following cases:

“First cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in some way affected, and the Court has therefore bound him with constructive notice of facts and instruments to a knowledge of which he could

(n) 13 S. C. R. 677 (1885).

(o) 1 Hare 55.

not have been led by any inquiry after the charge, incumbrance or other circumstance affecting the property, of which he had actual notice; and secondly, cases in which the Court had been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.'

"Notice of the kind first described, which merely puts the party on inquiry as to the facts of which it is material he should have knowledge, is clearly insufficient to postpone a registered instrument. But it is not to be assumed from this that actual notice to an agent will not bind the principal for the purpose in question. Notice of this latter kind, to which Lord Chelmsford has given the name of imputed notice being treated as actual notice to the principal, and that whatever the character of the agency may be, whether in the case of principal or agent strictly so called, or in that of one partner acting for the partnership, or a trustee for his *cestui que trust*, in all these cases actual notice to the agent is held to be as effectual to postpone a registered instrument as if given to the principal directly (p).

"In a case of *Wormald v. Maitland* (q) Stuart, V.C., held that constructive notice was sufficient to postpone a registered deed. But this case has been distinctly overruled in Ireland by *Russell v. Cushe* (r), by Brewster, Lord Chancellor, and in England in *Chadwick v. Turner* (s), where Turner, L.J., says that notice for this purpose must be clear and distinct and amounting in fact to fraud . . . :

"The actual notice required is of course actual notice of facts and not of conclusions of law.

(p) Citing *Tunstall v. Trappes*, 3 Sim. 286; *Rickards v. Brereton*, 5 Ir. Jur. 336; *Lenahan v. McCabe*, 2 Ir. Eq. 342.

(q) 35 L. J. Eq. 69.

(r) Trin. Term 1867. See Ir. Rep. 1867.

(s) L. R. 1 Ch. 310 (1866), *quære* whether a registered equitable mortgagee, without notice, is affected by the notice of his mortgagor.

"As Mr. Justice Patterson has remarked in his judgment, notice after a purchaser has acquired his title and paid his purchase money, if before he has registered his deed, is by the express words of the 80th section (t) sufficient to postpone him. This seems a very harsh rule and it is one which never prevailed in equity, but is in direct opposition to the previous authorities, *Elsey v. Lutyens* (u); *Essex v. Baugh* (v); *Reddick v. Glennon* (w); and also contrary to the analogy afforded by the doctrine of tacking and equitable priority generally, by which a purchaser or mortgagee without notice could at any time, and after having had notice, protect himself by getting in a prior legal estate. It is true that Lord Cairns in *Agra Bank v. Barry* (x) speaks of notice before registration being sufficient, but as the point did not arise there, and as all the authorities and reasonings to be discovered on the point are against such a rule, I take this to have been unintentional. Having regard to the terms of the 80th section, a purchaser is hardly safe unless his conveyance is executed in the registry office so that it may be placed upon record without allowing an interval for subsequent notice. Indeed this practice of executing deeds in the registry office, is said in a late case in the English Court of Appeals actually to prevail in the North Riding of Yorkshire, though for a less urgent reason than that which calls for it in Ontario (y)."

*Is notice to solicitor actual notice to client?*—"The only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transac-

(t) Now section 94.

(u) 8 Hare 159.

(v) 1 Y. & C. 620.

(w) 6 Ir. Jur. 39.

(x) L. R. 7 H. L. 147.

(y) Strong, J., in *Rose v. Peterkin*, 13 S. C. R. 677. See also *Bethune v. Caulcott*, 1 Gr. 81; *Wigle v. Settrington*, 19 Gr. 512.



tion, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client (z).

*Possession is not actual notice*:—Possession is not such notice as since the Registry Act of 1868 (a) will postpone a registered deed to the prior unregistered title of the party in possession (b).

*Attempt to reconcile sections 94 and 95*:—"I can suggest that we may prevent any clashing of the provisions by holding if an 'equitable lien, charge or interest' have been created by deed, or even by any writing capable of being registered, that actual notice of such deed or instrument would, under the 67th section (c), prevent the effect of priority of registration.

"But as to equitable liens, charges or interests, evidenced only by parol—as in the case before us—or as to such interests as a vendor's lien for unpaid purchase money, is there any reason for our denying that the legislature has emphatically excluded them from affecting a duly registered title?"(d).

*Unregistered equities*:—A parol trust cannot prevail over a mortgage registered without notice of the same (e).

Where a son had mortgaged as surety for his father, it was held that as against a *bona fide* purchaser for value without notice, from the father, neither the son nor his

(z) Rolland v. Hart, L. R. 6 Ch. 678 (1871), distinguishing Kennedy v. Green, 3 My. & K. 699. Cf. Bradley v. Riches, 9 Ch. D. 189 (1878); Nixon v. Hamilton, 2 Dr. & Wal. 364.

(a) 31 V. c. 20.

(b) Sherboneau v. Jeffs, 15 Gr. 574 (1869); Grey v. Ball, 23 Gr. 390; Roe v. Braden, 24 Gr. 589. As to law before 1865 or 1868 see Grey v. Couchier, 15 Gr. 419; Moore v. Bank of British North America, 15 Gr. 308, in which possession held sufficient notice. As to constructive notice see last cited case also Ferrass v. McDonald, 5 Gr. 310; Soden v. Stevens, 1 Gr. 346; Foster v. Beall, 15 Gr. 244.

(c) 31 V. c. 20 (Ont.), s. 67, now s. 94.

(d) Hagarty, C.J., in Peterkin v. McFarlane, 9 A. R. 443 (1884).

(e) Rose, J., in Bank of Montreal v. Stewart, 14 O. R. 482 (1887). See also Canada Permanent L. & S. Co. v. McKay, 32 U. C. C. P. 51 (1881).

assigns could operate the father's property with the amount for which the son was liable, that being an unregistered equity (*f*).

*Unregistered lien of vendor*:—Equitable lien would include a vendor's lien. It is usual where the purchase money is not fully paid to reserve the lien in the registered conveyance by mentioning it in the consideration clause, *e.g.*, as follows: "In consideration of two thousand dollars of which the sum of fifteen hundred dollars is still unpaid and is a lien upon the said lands" (*g*).

*Equitable right to rectification of instrument*:—The assignee of a mortgage without notice is not affected by the unregistered equity of a mortgagor (or his assigns) to have the mortgage reformed so as to exclude a portion of land not intended to be included in the mortgage (*h*).

In a Nova Scotia case where a mortgage conveyed one-sixth of a property instead of the whole, as intended, the right of an execution creditor was held to have priority over the equitable right to have the mortgage rectified (*i*).

*Effect of Registry Act on easement implied in grant*:—"It is clearly established law that where the owner of two adjoining lots conveys one of them he impliedly grants to the grantee all those continuous and apparent easements which are necessary to the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted" (*j*). Such being the case, what is the effect when the purchaser of the remaining ungranted lot registers his deed without actual notice of such easements.

(*f*) *Core v. Ontario Loan & Debenture Co.*, 9 O. R. 236 (1885), following *Grey v. Ball*, 23 Gr. 390.

(*g*) See *Kettlewell v. Watson*, 26 Ch. D. 501 (1884), as to rule under the West Riding Act (2 & 3 Anne, c. 4).

(*h*) *Bridges v. Real Estate Loan & Debenture Co.*, 8 O. R. 497 (1885), *Boyd, C.*

(*i*) *Miller v. Duggan*, 23 N. S. R. 140 (1890).

(*j*) *Street, J.*, in *Israel v. Leith*, 20 O. R. 367 (1890).

This is considered with great care in *Israel v. Leith* (k), in the following instructive passage :—

“The Registry Act requires instruments affecting lands to be registered ; originally it did not interfere with rights legal or equitable, arising otherwise than by instruments capable of being registered : *Harrison v. Armour*, 11 Gr. 303 (l). Then it was amended so as to postpone in certain cases unregistered equitable rights whether based upon written instruments or not, but this left untouched the case of legal rights arising otherwise than under written instruments. If, therefore, the rights in question here are to be treated as arising under an implied grant, they are outside the effect of the Registry Act ; and, being prior in point of time, and arising under a grant, they must prevail over the defendant, a subsequent purchaser of the estate out of which they were granted.

“If they are to be treated as arising under express grant, undoubtedly the Registry Act applies, but I am unable to see that the defendant's position is strengthened. There is nothing in the Act requiring the creation of legal rights or their transfer to be evidenced by any new forms of words ; it only requires that the instruments creating or transferring rights to lands shall be registered, and when registered in the due order of their dates, no provision in the Act disturbs the effect which would have been given to them had no registry law prevailed. Here the plaintiff's conveyance is prior in point of time to the defendant's ; it passed certain legal rights to the plaintiff in the land which the defendant subsequently purchased. The instrument under which these rights passed is first in

(k) *Ib.* at p. 368 ; *dicta* of Patterson, J.A., in *Carter v. Grasett*, 14 A. R. 709, dissented from.

(l) Case of equitable mortgage by deposit of title deeds. Cf. *McMaster v. Phipps*, 5 Gr. 258 (1855), case where a claim to rectify the description in an instrument given priority over a judgment ; *Montgomery v. Gore* District Mutual Insee. Co., 10 Gr. 501 (1864), lien of mutual insurance companies on property insured ; *Robson v. Carpenter*, 11 Gr. 293 (1865), warrant of bankruptcy held registrable. See also 14 C. L. T. 45, “Easements and Registration.”

point of time and first in point of registration, and therefore there is nothing in the Registry Act to take away the rights acquired by the plaintiff under it."

*Tacking*:—Briefly stated, tacking was the action of an incumbrancer in uniting two or several incumbrances by the same mortgagor on the same land and refusing redemption of the one incumbrance without also the payment of the other or others, with the result of shutting out any *mesne* incumbrancer. The following were the main principles of tacking:—

I. A third mortgagee (without notice of second at time of advance of money) buying in the first mortgage might tack the third to the first, "he shall thereby squeeze out the second mortgage" (*m*).

II. A judgment creditor buying in first mortgage could not tack (*n*).

III. A first mortgagee (without notice) lending a further sum on a judgment (*o*) or mortgage (*p*) might tack against *mesne* incumbrancers (*q*).

IV. Where legal estate outstanding, incumbrancers ranked according to time (*r*).

*Consolidation*:—The general principle of consolidation was that a mortgagee should not be redeemed in respect of one mortgage without being redeemed also as to another mortgage created by the same mortgagor (*s*). Attempts have been made to confuse the doctrine of consolidation with that of tacking (*t*).

(*m*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491 (1728).

(*n*) *Ib.*

(*o*) *See Shepherd v. Tilley*, 2 Atk. 352.

(*p*) *See Wylie v. Pollen*, 11 W. R. 1081.

(*q*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 494.

(*r*) *Ib.* at p. 495.

(*s*) *See Dominion Savings etc., Society v. Killridge*, 23 Gr. 634 (1876); *Johnston v. Reid*, 20 Gr. 293 (1881). *See also* 29 C. L. J. 583, article on consolidation.

(*t*) *Johnston v. Reid*, *supra*.

*Tacking or consolidation is not abolished except as against registered conveyances* :—"To avoid circuity of action a mortgagor's heirs or devisees are never permitted to redeem the mortgage without also paying a bond or judgment debt owing by the mortgagor. That is not such a tacking as the Registry Act forbids" (u).

*Consolidation an occult equity* :—"The right of Dr. R. to come upon the St. Mary's property to make good the deficiency on the Hamilton property is an equity. It cannot be placed higher than an equity affecting the St. Mary's property, and under *McMaster v. Phipps* (v), would have been held to be an equity affecting the St. Mary's property against the plaintiff's registered mortgage because it was itself incapable of registration.

"The policy of our Legislature has been to allow no effect to occult equities, and in the case of transfers of real estate whether absolutely or by way of mortgage; that men dealing in real estate should be able to find the state of the title by search in the registry offices and in one or two other public offices. The 68th section of the Registry Act is an instance of this" (w).

*Retrospective operation of these sections* :—Section 66 of the Registry Act, 1865, and section 68 of the Registry Act, 1868 (x), have been held retrospective, and therefore affect equities existing before the present section was passed (y).

*How writs of fi. fa. lose their priority* :—Where an execution creditor sent his renewed writ to the wrong sheriff, by mistake, he lost his priority over a subsequent

(u) *Mowat, V.C.*, in *McLaren v. Fraser*, 17 Gr. 536 (1870).

(v) 5 Gr. 253.

(w) *Johnston v. Reid*, 29 Gr. 293 (1881), *Spragge, C.*

(x) Both these sections are now represented by section 95. Cf. *Miller v. Brown*, *infra*; *Fraser v. Nagle*, 16 O. R. 241; see also *Armour on Titles*, 63; *Brewer v. Canada Permanent*, 24 Gr. 509.

(y) *Proudfoot, J.*, in *Miller v. Brown*, 3 O. R. 215 (1882), citing *McDonald v. McDonald*, 14 Gr. 133, *Bell v. Walker*, 20 Gr. 558, *Grey v. Ball*, 23 Gr. 390. See *Cooley v. Smith*, 40 U. C. R. 543 (1877).

incumbrancer who had full notice of the writ at the time of registering his mortgage. The reasons thereof will appear from the following judgment of Ferguson, J.: "It is, I think, a matter of construction of the statute only. (See R. S. O. 1877, c. 66, s. 11 and Con. rule 894).

"*Prima facie*, and according to law apart from this statute, an execution plaintiff having his writ in the hands of the sheriff must continue it there for execution, that is to say, the writ must remain in the hands of the sheriff to be executed, in order to preserve his priority; and on this his right in respect of priority depends. The statute provides for the renewal of writs, and necessarily, I think, for the removal of the writ in each case out of the actual possession of the sheriff for the purposes of such renewal. This seems the exception to the general rule, and the time during which a writ may for the purpose of renewal be kept out of the hands of the sheriff, without interference with the right of priority, is, I think, commensurate with the time reasonably necessary to effect the renewal, although the Courts may not in any case measure such time very nicely or with great particularity. In *Meneilly v. McKenzie*, 3 E. & A. 209, the time was only fifteen days" (z).

It may be as well to note the passing of 57 V. c. 26: "An Act respecting writs of execution," section 2 of which Act is intended to provide for the renewing of a writ of execution only once in three years instead of as hitherto, once every year (a).

We may here insert an Act which deals with the matter of mortgages for future advances:—

(z) *Re Hime and Leadley*, 13 P. R. 1 (1889). See further as to rights of execution creditors, *Russell v. Russell*, 28 Gr. 419 (1881); *Gall v. Bush*, 8 Gr. 360, and the Act of last session, 57 V. c. 26.

(a) But *quære*, from what starting point in the case of writs now in the sheriff's hands will the "period of three years" run? See section 2 of said Act.

## 57 Vict. CHAPTER 34.

## An Act to make further provision respecting Mortgages of Real Estate.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. To remove doubts, every mortgage duly registered against the lands comprised therein is, and shall be deemed as against the mortgagor, his heirs, executors, administrators, assigns, and every other person claiming by, through or under him to be, a security upon such lands to the extent of the moneys or money's worth actually advanced or supplied to the mortgagor under the said mortgage (not exceeding the amount for which such mortgage is expressed to be a security), notwithstanding that the said moneys or money's worth, or some part thereof, were advanced or supplied after the registration of any conveyance, mortgage, or other instrument affecting the said mortgaged lands, executed by the mortgagor or his heirs, executors or administrators, and registered subsequently to such first-mentioned mortgage, unless before advancing or supplying such moneys or money's worth the mortgagee in such first-mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage or other instrument; and the registration of such conveyance, mortgage or other instrument after the registration of such first-mentioned mortgage, shall not constitute actual notice to such mortgagee of such conveyance, mortgage or other instrument.

Mortgages how affected by subsequent registered conveyances.

2. This Act shall not apply to any pending action, and shall not affect any question of priority in respect of advances made by a mortgagee before the passing of this Act.

Pending actions and advances made prior to Act.

*Intention of this Act of 57 Vic.*:—The Act of 57 V. c. 34 is probably intended as a commentary on the decision of Ferguson, J., in *Pierce v. Canada Permanent Loan &*



*Savings Co., (b).* The learned judge says:—"The contention of the plaintiff is that her mortgage was not and should not be postponed to the advances made to W. their mortgagor, by the company after the registration of her mortgage; and if the company when making such advances had had notice, that is actual notice of the plaintiff's mortgage, the authorities shew I think that this contention should succeed: *Hopkinson v. Rolt*, 9 H. L. C. 514; *Union Bank of Scotland v. National Bank of Scotland*, 12 A. C. 53; *Blackley v. Kenny*, 16 A. R. 522" (c).

So far the learned judge and the new enactment are in accord, but his Lordship afterwards concludes: "that the plaintiff's mortgage should be declared to have priority over the advances made by the company after the registration of it, *as such registration must in this view be considered notice* of it to the company at the time of their acquiring further interests in the property by making the further advances on their mortgage" (d). It is at this point that the Act of 57 V. intervenes to prevent such registration from being considered actual notice *i.e.* such actual notice as would give the subsequent mortgage priority over further advances.

"*Is expressed to be a security*":—A distinction must be made between a mortgage for future advances and a further charge; a further charge is evidently not intended to be affected by this enactment, and will require registration to secure priority (e).

(b) 24 O. R. 426, decided Jan. 26th 1894.

(c) *Ib.* at p. 428.

(d) *Ib.* at p. 431, after discussing *Boucher v. Smith*, 9 Gr. 347; *Trust & Loan Co. v. Shaw*, 16 Gr. 446, and other cases.

(e) *Credland v. Potter*, L. R. 18 Eq. 350; 10 Ch. 8 (1874); *Moore v. Culverhouse*, 27 Beav. 639 (1860). For mortgage to secure future advances see *Ex. p. Hawes, Re Byrnes estate*, 15 Ir. L. R. 189, 373.

*Relation of 57 V. c. 34, and 56 V. c. 24*:—56 V. c. 24, s. 6, make a provision by which mortgages to secure future advances are not to have priority if the mortgagee at the time of advance "has actual and express notice" that there are any claims of mechanics under sec. 4 of the Mechanics' Lien Act; nor unless the mortgagee gets from the mortgagor a certain affidavit or declaration. The question then arises is the Act of 57 V. c. 34, intended to change the law as enacted by 56 V. c. 24, s. 6.

In favour of the view that the Act of 57 V. applies to mechanics liens is the phraseology: "shall be deemed as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him;" which would include a lien-holder; also the fact that in the above cited decision in *Pierce v. Canada Permanent*, some of the cases discussed by Ferguson, J., and forming the basis of his decision are cases of mechanics liens (*f*).

Against the view that mechanics' liens are affected, the words: "executed by the mortgagor or his heirs, executors, or administrators" seem designed to exclude any persons who have become incumbrancers or assigns *in invitum* of the mortgagor.

#### MISCELLANEOUS PROVISIONS.

##### PLANS.

96. (1) Where any land is surveyed and subdivided for the purpose of being sold or conveyed in lots, by reference to a plan which has not been already registered, the person making the subdivision shall, within three months from the date of the survey, file with the Registrar a plan of the land on a scale not less than 1 inch to every 4 chains. The plan shall show the number of the township, town or village lots and range or concession as originally laid out, and all the boundary lines thereof, within the limits of the land shewn on the said plan, and where such plan is a subdivision of a lot or lots on a former plan, it shall shew the numbers or other distinguishing marks of the lot or lots subdivided, and the boundary lines of

Registration  
of plans  
when land  
subdivided.

Scale of  
plan, and  
what to  
shew.

(*f*) *E.g.* Richards v. Chamberlain, 25 Gr. 402; McVean v. Tiffin, 13 A. R. 1; McNamara v. Kirkland, 18 A. R. 271; Hutson v. Valliers, 19 A. R. 161.

such lot or lots. The plan shall also shew all roads, streets, lots and commons, within the same, with the courses and widths thereof respectively, and the width and length of all lots and the courses of all division lines between the respective lots within the same, together with such other information as is required to shew distinctly the position of the land being subdivided. R. S. O. 1887, c. 114, s. 84, s-s. 1.

Plans to be mounted.

(2) Every such plan shall be mounted on stiff paste-board of good quality, and in case it exceeds thirty inches length by twenty-four inches in width shall be folded so as to exceed that size. 53 V. c. 30, s. 5.

Duty of Registrars thereafter

(3) Every such map or plan, before being registered, shall be signed by the person or the chief officer of the corporation by whom or on whose behalf the same is filed, and shall also be certified by some provincial land surveyor in the form of Schedule O to this Act; and thenceforth the Registrar shall keep an index of the lands described and designated by any number or letter on the map or plan, by the name by which such person, corporation or company designates the same in the manner provided by this Act; and all instruments affecting the land or any part thereof, executed after the plan is filed with the Registrar shall conform and refer thereto, otherwise they shall not be registered. R. S. O. 1887, c. 114, s. 84, s-s. 2.

Instruments must conform to such plan.

Penalty for refusing to register plan.

(4) In the case of refusal by such person, corporation or company, his or their executors, agents or attorneys, or assessors, for two months after demand in writing for the same, to lodge the said plan or map when required by any person interested therein, or by the inspector so to do, he or they shall incur a penalty of \$20 for each and every calendar month the said map or plan remains unregistered, which penalty may be recovered by any person complaining, in any Division Court, in the county in which such lands are situated, in like manner as a common debt. R. S. O. c. 114, s. 84, s-s. 3.

How recovered.

Verification of signature to plans.

(5) The signature on a map or plan for the purposes of subsection 3 of this section shall be witnessed and verified as other instruments are under the said Act. 52 V. c. 19, s. 6.

Conditions as to registration of plans.

(6) The Registrar shall not accept any map or plan for the purposes of this Act, which does not comply with the provisions of this Act; and shall not accept any plan on which a road less than sixty-six feet wide is laid out, unless the assent of the proper municipal council is registered therewith, where such assent is by law necessary. 52 V. c. 19, s. 7.

Plans of unpatented lands.

(7) The Registrar shall not receive or file, any plan or map of a subdivision of any land for which the Crown patent has not issued, unless the assent of the Commissioner of Crown Lands to such receipt and filing is endorsed thereon.

For addition to sub-section 3 of section 96, *see* 57 V. c. 35, s. 2.

*The person to file a plan, should be its rightful maker, i.e. the owner:—*"The statute (*g*), while it does not in so many words say that the person to file a plan is the owner of the subdivided land, plainly contemplates the owner as the person. It does not assume to authorize the subdivision. That is an act of ownership. But it requires that when a subdivision is made, the person who makes it shall file his plan; and thenceforward the registrar is to adopt an index founded on the plan, and is not to register any instrument affecting the land or any part thereof, executed after the plan is filed unless it conforms to the plan" (*h*).

*Remedy for unauthorized filing of plan:—*"It is clear that the existence on the files of the registry office of an unauthorized plan may inconvenience the owner of the land it affects to deal with, and lead to confusion in the investigation of titles.

"If actual damage is suffered from it, an action for damage will, I do not doubt, lie against the wrongdoer; but the rule that governs the analogous action for slander of title, will prevent a recovery when there has been no actual damage, which is the present case: *Malachy v. Soper*, 3 Bing. N. C. 371.

"But to proceed for an order to take the unauthorized plan off the files is a different thing; and M. not being the owner at law or in equity, but having only a right to become owner on payment of \$250, there is no reason why immediately after the fifth of August, 1880, an order should not have been made, if it had been then asked for, compelling him to remove or amend the plan" (*i*).

(*g*) R. S. O. c. 111, s. 82; the present section 96.

(*h*) Patterson, J.A., in *Nevitt v. McMurray*, 14 A. R. 126 (1886).

(*i*) *Ib.*

*Mortgagor and mortgagee ; right to file plan* :—It seems that the mortgagor is not absolutely precluded from subdividing and filing a plan of subdivision, although it would be a very unwise course in his own interest to do so, without the consent of the mortgagee ; and no purchaser would accept the title of one of the subdivided lots under such circumstances. Patterson, J.A., says in *Nevitt v. McMur-ray* (j).

"I am not prepared to hold that a mortgagor of land deprives himself as of necessity, by the mere fact of making a mortgage, of the right to subdivide the land and file a plan though one can imagine circumstances that might give the mortgagee a right to object to his doing so"

*Rights of mortgagee in case of foreclosure* :—In a case where the mortgagor had subdivided the property into a great number of lots and registered several plans, and a question was raised as to how far the mortgagee was bound by such plans and subdivisions. Robertson, J., said :—

"Is the mortgagee obliged to recognize these subdivisions? Is his property to remain an open common? Is he, after foreclosure, obliged to recognize the streets and lanes which have been laid out on it in accordance with these registered plans? The learned Inspector (k) says not, and I agree with him. That being the case, his final order of foreclosure will, when carried into the Registry Office, annihilate the subdivisions and plans, and the mortgagee can then close up all streets and wholly enclose the property. His mortgage would be a poor security if he could not" (l).

*Can sheriff sell without reference to new plan?*—See *Rathbun v. Culbertson* (m).

(j) 14 A. R. 126 (1886). See *ib.* for remedies of mortgagee in such cases.

(k) Inspector of Registry Offices.

(l) *Morse v. Lamb*, 23 O. R. 168 (1893). But see *ib.* 608.

(m) 22 Gr. 465 (1875), sale of undivided interest in original township lots.

"Otherwise they shall not be registered":—"The one and only case in which a registrar is forbidden to register a conveyance by reason of the description of lands contained in it, is that of a conveyance made after the registration of the plan of a subdivision where the conveyance does not conform and refer to the plan: s-s. 2, s. 84, c. 114, R. S. O. (n). Now it appears to me that the only meaning of this section is to require that conveyances of land forming part of the subdivision shall describe the lands conveyed by reference to the subdivision, and not by reference to the original lot which has been subdivided, and that, for the purpose of avoiding the confusion which might arise from describing lots by reference to a description which has been changed, the registrar shall refuse to register conveyances which do not conform and refer to the registered subdivision. I find no indication in this clause of an intention to require a more particular or exact description of parcels which form part of a registered subdivision, than of parcels which form part of an original lot, and yet, that it seems to me must be the effect of the section, if it is to bear the construction placed upon it by the *dicta* to which I have referred. The conveyance under which the plaintiff claims here complied with the provisions of the section in question, when it referred to the subdivision and plan of which the lot mentioned in it formed part; the registrar could not possibly have refused to register it; and being registered, it was, I think, notice of the conveyance of everything which according to law passed under the description contained in it or as incident thereto" (o).

*Instrument partly capable and partly incapable of registration*:—Where two lots, fourteen and fifteen, had been laid out into village lots and a plan filed, and the registrar was required to register a certificate of *lis pendens*

(n) Now s. 96 (3). For exception, see s. 100, *infra*.

(o) Street, J., in *Israel v. Leith*, 20 O. R. 369 (1890).

against lot sixteen and lots fourteen and fifteen, and he refused to register the same, it was held that he was right as to the lots fourteen and fifteen, but that there was no difficulty in recording the certificate against lot sixteen (*p*).

*Omission of owner to sign certificate:—See Wyoming v. Bell* (*q*).

*Uncertified plan, how far registered deed may refer to:—*"It was further objected that the plan was not made as is required by the Registry Law, R. S. O. c. 111, s. 82, s-s. 2. It is quite true that the plan was not certified according to the requirements of the Registry Law of the time, and that the error has not since been rectified, and therefore the registrar could not treat nor has he treated it as sufficient to authorize the registration of deeds affecting village lots merely as such. Hence the deeds affecting village lot No. 7 were registered, and deeds affecting the other village lots conveyed, so far as disclosed by the evidence, were registered as parts of lot 14 in the first concession of the township of Cumberland, and not in a separate register book for village lots. The registry, or filing of the plan in the registry office, had no effect, I apprehend, under the Registry laws.

"But reference might be made to it there, as it might to that of any other document there or elsewhere, in a deed for the description or designation of a lot called a village lot, being part of a township lot, even if not stated in the deed to be part of a township lot, provided reference was made in the deed to that particular plan or other document for the description; and even popular understanding may be referred to for the same purpose, when it is capable of proof: *Dougall v. The Sandwich and Windsor Plank and*

(*p*) *Re Thompson and Webster*, 25 U. C. R. 237 (1866). Cf. *Aston v. Innis*, 26 Gr. 42 (1878), anything beyond numbers of lots on plan of subdivision is surplusage and will not vitiate.

(*q*) 24 Gr. 564, 568 (1877).



*Gravel Road Co.*, 12 U. C. R. 59. As to reputation of this kind, *McMurray v. Spicer*, 5 Eq. 527 at p. 537" (r).

See further section 100, *infra*.

97. Section 96 of this Act shall apply as well to lands already surveyed or subdivided as to those which may hereafter be surveyed or subdivided, subject to the provisions of section 101 of this Act. R. S. O. 1877, c. 114, s. 84, s-s. 4. See also R. S. O. c. 152, s. 63. Application of sec. 96.

98. The inspector shall have power to direct where he deems it necessary that a plan index book shall be kept by the registrar in manner and form directed by the inspector. 53 V. c. 30, s. 6. Plan index book.

*Plan index* :—*Quere*, have public right to inspect plan index? See abstract index, section 36, *supra*.

99. (1) Whenever from time to time the inspector of registry offices deems that the public convenience so requires, he may direct a Registrar to subdivide any township, park or other lots in a city, town or village into such blocks for abstract purposes as having regard to conveyances registered upon such lots and otherwise, he considers most convenient; and in such case an abstract index shall be prepared by the Registrar for each of the said blocks as if the same had been originally a separate lot; such abstract index shall extend from the Crown Patent onwards, and shall contain those registrations only that affect the subdivision to which the index relates. Abstract index to subdivisions of townships, etc.

(2) Where the original lines of the lots do not form the boundaries of such blocks, public streets shall be taken as the boundaries thereof.

(3) Where a plan of a lot or part of a lot subdividing the same has heretofore been registered, or where a plan is hereafter registered of a lot or part of a lot not previously subdivided by a registered plan, the inspector may direct the Registrar to prepare an abstract of all instruments affecting the part subdivided, and to enter the same in the page or pages of the abstract index book immediately preceding the abstract as to the first lot on such plan.

(4) Whenever and as often as a further subdivision of any of the lots on said plan is made, the inspector may direct the

(r) O'Connor, J., in *Ferguson v. Weissor*, 10 O. R. 23 (1885). The decision in this case was reversed, 11 O. R. 88, but the above statement was not affected. Cf. *Muttlebury v. King*, 44 U. C. R. 355.

Registrar to prepare and enter in like manner an abstract of all instruments affecting the part so subdivided from the filing of the previous plan onwards.

(5) The Registrar shall be allowed for preparing such abstracts, so far as the same relate to instruments registered prior to the inspector's directing the subdivision, such amount as the inspector may determine to be reasonable for the work performed, and the same shall be paid by the owner who registers the plan or out of the fees payable to the county or city under section 119 of this Act, as the inspector may direct.

(6) For abstracts prepared for the purposes of plans hereafter registered, the Registrar shall be entitled to receive from the persons registering such plans, the usual fees for preparing such abstracts; such fees to be paid in addition to the fees for registering such plans. 52 V. c. 19, s. 1.

Registration of instruments referring to an unregistered plan.

100. No instrument referring to an unregistered plan shall be registered unless where an instrument referring to such plan has been already registered in respect of the same land; and in case the registrar objects to register any instrument on account of its referring to an unregistered plan, he shall be justified in doing so until and unless the person desiring registration of the instrument refers the Registrar to the number of an instrument previously registered in respect of the same land referring to the said unregistered plan. 52 V. c. 19, s. 2.

When plan must be registered in case of lands subdivided before 4th March, 1868.

101. In sales of lands under surveys or subdivisions made before the fourth day of March, 1868, where such surveys or subdivisions so differ from the manner in which such land was surveyed or granted by the Crown that the parcel so sold cannot be easily identified, the plan or survey shall be registered within six months after the passing of this Act if the plan or survey is still in existence and procurable for registration, and filing under the next preceding section, and if it is not, a new survey or plan shall be made by and at the joint expense of the persons who have made such surveys or subdivisions, and of all others interested therein, by some duly authorized provincial land surveyor, or as nearly as may be according to the proper original survey or subdivision, and the same when so made shall be filed as if under section 96 of this Act. R. S. O. 1887, c. 114, s. 85.

"Fourth day of March, 1868":—Date of assent to 31 V. c. 20.

Plan not binding until some sale

102. In no case shall any plan or survey, although filed and registered, be binding on the person so filing or registering the same, or upon any other person, unless a sale has been made

according to such plan or survey, and in all cases amendments or alterations of any such plan or survey may be ordered to be made, at the instance of the person filing or registering the same, or his assigns, by the High Court, or by a Judge of the said Court, or by the Judge of the County Court of the county in which the lands lie, if on application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient. An appeal shall be from any such order to the Court of Appeal. R. S. O. 1887, c. 114, s. 86.

is made  
under it ;  
alterations  
in plan.

Appeal.

*Agreement to sell according to plan :—*An agreement to sell land "according to a plan deposited in the Land Registry Office, and numbered 319" does not convey a warranty that the plan is deposited in accordance with the Act (s).

*Registration of and sale by plan ; rights of purchasers and public :—*"Apart from the Registry Act altogether, no one would think of disputing the proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shown upon the plan adjoining the lots sold, which places them beyond vendor's future control to their injury.

"It was admitted upon the argument that the mere registration of such a plan would not conclude the owner or confer any rights upon the public, although he might possibly—until the passing of Ch. 93 of the Consolidated Statutes, subsequently varied and amended by the 24th V. c. 49—have been subjected to some inconvenience by the refusal of the registrar, after the registration of such a plan, to receive for registration a conveyance of the land, or any portion of it, described otherwise than in accordance with such sub-division. Then how would the public acquire rights by the mere sale ? The purchasers could unquestionably insist upon the lane being kept open for their use, but is it not clear that by agreement among themselves they

(s) *Thompson v. Courtney*, 2 Brit. Col. R. 89 (1892), *Begbie, C.J.* Cf. *Rossin v. Walker*, 6 Gr. 619.

could abstain from opening it altogether or enforce its being maintained as a private way? Does it not follow that the owner might, therefore, under such circumstances by a re-purchase of all the lots sold, at all events before any actual use of the lane, re-invest himself with the same rights and dominion over the property which he had before the sale.

"How then is the question affected by the Registry Act? It is manifest that a registry law would be of little avail in cases where the original lot had been surveyed or subdivided into other lots in such a manner that by the new description the parcel conveyed could not be easily identified, if it were not made obligatory upon proprietors to register a plan of such new survey, and upon the registrar to keep an index of the new survey, and to register no conveyances affecting the land so subdivided, unless made in conformity with it; but it was not intended to alter the relative rights of vendors and purchasers, or to confer any additional right upon the public than they would have had under a sale made in accordance with an unregistered map or plan.

"If it be true as alleged that the public interests require that this lane be opened, the proprietors must submit to the law, but there is no good reason why the public should be benefited at their expense" (*t*).

*Public highways, how far dealt with by this section?—*

"The only remark necessary to make respecting these statutes is, that they do not profess to deal with the subject of public highways; they deal with the registration of titles and private rights connected with or affected by registration; and, when they assume to make registered plans

(*t*) *Re Morton and Corporation of St. Thomas*, 6 A. R. 379 (1881), Burton, J.A. See judgment of Patterson, J.A., in same case, for bearing of Surveyors' Act on this subject. See also *Regina v. Rubidge*, 25 U. C. R. 299; *Regina v. Boulton*, 15 U. C. R. 272; *Guelph v. Canada Co.*, 4 Gr. 632; *Atty.-Gen. v. Brantford*, 6 Gr. 592; *Atty.-Gen. v. Goderich*, 5 Gr. 402; *Saugeen v. Church Society*, 6 Gr. 538.

binding, that effect extends only to the sub-divisions as recognized in registration, and to the titles acquired by conveyances in conformity with registered plans" (u).

*Effect of plan as evidencing dedication to public :—* Osler, J.A., says : " Neither the mere marking out upon a plan, of spaces for roads and streets, nor the registration of such a plan, nor the sale of lots according to it, nor all of these acts combined, will constitute an absolute dedication of the places so marked down as public roads or highways.

" They may become so by any acts from which an irrevocable intention to dedicate them may be inferred, and by acceptance by the municipality, and then section 527 (v) has its operation" (w).

*Until dedication is absolute, plan not binding :—* The same Judge continues :—

" But until they do so, section 84 (x) expressly provides that a plan, although filed, is not binding, and though sales may have been made under it, is only binding *sub modo*, that is to say, to the extent that the Court or a Judge may think proper to permit a proposed amendment.

" I do not understand that section 84 is intended to authorize the Judge to amend a plan by closing any road or street laid down thereon which has become a public highway in fact, though that is a fact he may have to determine" (y).

*Subsequent plan will not affect actual dedication :—* Where there had been an actual dedication to the public, any words on a plan, registered subsequently, purporting

(u) Patterson, J. A., in *Re Morton and Corporation of St. Thomas*, 6 A. R. 330 (1881).

(v) Of the Municipal Act. See Consolidated Municipal Act, 1892, s. 527.

(w) In *Re Waldie and Village of Burlington*, 13 A. R. 111 (1886).

(x) Now section 102.

(y) In *Re Waldie* supra.

to restrict or qualify the public use would be inoperative (z).

*Jurisdiction of the courts*:—"The jurisdiction thus conferred upon the Judge of the County Court to order the amendment of a claim is precisely the same as that conferred upon the several divisions of the High Court and the individual Judges thereof. All of these tribunals stand on the same footing as regards general jurisdiction over the subject matter, which is the making of such an order in a proper case" (a).

*Status of party applying is within jurisdiction of County Judge*:—"Laying aside this question for the present, I think the authorities conclusively show that the appellant's status, as a person who had registered the plan, or the assign of a person who had done so, was a question of law and fact combined, for the County Judge—just as it would have been for the High Court or a Judge of that Court—to determine in the course of the inquiry, and that his decision is not examinable in prohibition. . . . The Judge had jurisdiction over the subject matter, and was therefore competent and bound to decide any facts or questions of law and fact combined, of which the status of the applicant was one necessary to be adjudicated upon in the course of the inquiry" (b).

*Decision may be appealed from*:—"Although prohibition may not lie, the decision of a Court or Judge under this section is subject to review on appeal (c).

"*At the instance of the person filing or his assigns*":—A subtle objection was raised in *Re Waldie and Village of*

(z) *Peck v. Corporation of Galt*, 46 U. C. R. 211, 217 (1881), Osler, J.

(a) Osler, J.A., in *Re Chisholm and Corporation of Oakville*, 12 A. R. 225, citing *Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417; *Bembury v. Fuller*, 9 Ex. 111; *Re Bowen*, 15 Jur. 1196; *Brittain v. Kinnaird*, 1 Brod. & B. 432 and other cases.

(b) *Ib.*

(c) Osler, J.A., in *Re Waldie & Village of Burlington*, 13 A. R. 104 (1886).

*Burlington (d)*: B. was the maker of a plan which was not registered by him, but by the Council of Burlington. W. was an assign of B. The objection then arose, was W. an assign of the person filing the plan? Osler, J.A., held that the Council, being interested in respect of any streets laid down on the plan, had the right to file the plan under the Act (e), and were to be regarded as representatives of B. Consequently he treated the plan as B's plan and as if filed by him or his representatives, with the result of giving W. a status to apply to have the plan amended.

*Person filing within this section may be intending owner*:—"It is not said that the person registering must then be the owner. It may be done in contemplation of becoming the owner. When the appellant registered, it may have been and probably was a perfectly futile proceeding against everybody, but when he afterwards became the owner of the land he might adopt the plan as he, in fact, seems to have done. Now, as the owner, he asks that the plan thus registered by him may be amended, and I think he comes within the Act" (f).

103. (1) Where an incorporated city, town or village, or village not incorporated, comprises different parcels of land owned at the original division thereof by different persons, and the same were not jointly surveyed and one entire plan of such survey made and filed in accordance with section 96 of this Act, the Municipal Council of the township within which such unincorporated village is situated, or of such incorporated city, town or village shall, upon the written request of the inspector or of any person interested, addressed to the clerk of the municipality, immediately cause a plan of such city, town or village to be made upon the scale provided for under this Act, and to be registered in the Registrar's office of the registry division within which the municipality lies, which map or plan shall have endorsed thereon the certificates of the clerk and head of the municipality and the

Plans of towns or villages to be registered in certain cases.

(d) 13 A. R. 108, 110.

(e) *I.e.*, under present section 96. Where a plan is filed, unless it can be shown to be filed under some other section, it will be taken as if filed under section 96. See *Id.*

(f) Osler, J.A., in *Re Chisholm & Corporation of Oakville*, 12 A. R. 23 (1885); decision of Proudfoot, J., 9 O. R. 274, reversed.



surveyor, that the same is prepared according to the directions of the municipality, and in accordance with this Act, and to the map or plan the corporate seal of the municipality shall be attached.

Payment  
of expenses.

(2) The expense attending the preparing and depositing of the map or plan shall be paid out of the general funds of the municipality, except in the case of unincorporated villages, where the same shall be paid by a special rate to be levied by assessment on all ratable property comprised in the unincorporated village, as described by metes and bounds in a by-law to be passed by the municipality for the purpose of levying such rate; and in case of the refusal of the municipality to comply with all the requirements of this section within six months next after being required in manner aforesaid so to do, the municipality shall incur the same penalty, and the same shall be recoverable in the manner provided in section 96 of this Act.

Registration  
of township  
subdivi-  
sions in cer-  
tain cases.

(3) Where land in a township has been or shall hereafter be sold under surveys or subdivisions made in a manner which so differs from that in which such land was surveyed or granted by the Crown, that the parcel sold cannot be easily identified, and the map or plan has not been registered under this or any other Act in that behalf, the council of the township may, at the written request of the inspector, or of any person interested, cause a plan of any such land to be made and registered in the same manner and with the same effect as in the case of an unincorporated village; and the expenses attending the preparation of and filing of the map or plan shall be paid by a special rate to be levied by assessment on the lands comprised in said map or plan, as described in a by-law to be passed by the council for the purpose of levying such rate; and the municipality shall have the like remedies for the recovering of such last mentioned expenses as it has for compelling payment of taxes.

Obliga-  
tions not  
impaired.

(4) Nothing in this section contained shall be deemed or construed to relieve any person from any liability, duty, obligation, or penalty provided or imposed by or under any of the provisions of section 96 of this Act. R. S. O. c. 114, s. 87.

Power of  
county  
judge to  
order new  
plans to  
be filed.

(5) Where any land has been sold or conveyed in lots or parcels by metes and bounds, or where portions of lots shown by any registered plan or subdivision have been sold, and the lots or parcels so sold are not distinguished by numbers or letters, the judge of the county or district in which the land is situate may, on the application of the inspector, after such notices as the judge may think reasonable, on being satisfied that it is expedient so to do, make an order directing the Registrar, in whose division such land is situate, to have the same, or any part thereof, laid out into lots or parcels in such manner and numbered as he shall think fit, and a plan or plans thereof made in

accordance with the records in the registry office, or from actual survey, as may be found necessary, and registered in accordance with the provisions of this Act, which plan shall have the order of the judge endorsed thereon, signed by him. The costs and expenses of and incidental to such plan and the registration thereof shall be borne by the person, corporation or municipality to be named by the judge in the order. Such order shall be entitled in the County Court and in the matter of the lands in question, and on filing the order with the clerk of the County Court the same may be enforced as if it were a judgment of the Court. The registration of such plan shall be binding on all parties subsequently dealing with the lands or any part thereof included in the plan or any interest in or concerning the same, but shall not affect in any way the rights or interests of any owner or other person entitled at or prior to the date of registration.

Costs.

Effect of  
registration.

*Application of section 103*:—Section 103 represents R. S. O. 1877, c. 111, s. 85, s-ss. (1) and (2); with s-ss. (3) and (4) added by 48 V. c. 23 (Ont.) s. 2; the same being further amended by 49 V. c. 16 (Ont.) s. 30, which inserted the word “city” before town wherever the latter occurs. The application of section 85, as it originally stood, is thus shewn by Osler, J.A., in distinguishing its application from that of the preceding section, now section 102:—

“Section 85 applies when an incorporated town or village, or an unincorporated village, comprises different parcels of land owned at the original division thereof by different persons, and which were not jointly surveyed, and one *entire plan* of such survey made and filed in accordance with the 82nd section (*g*). . . . There the municipality is required to have a plan of the town or village made and registered.

“That is not this case, as the plan in question is a plan of a parcel of land owned and surveyed by one person, and of a part only of the land comprised in the village.

“What the section contemplates is a compilation of the several unregistered plans or surveys of the different

(*g*) Now section 96.

parcels of land which compose the area of the town or village or a new plan of the whole" (h).

Delivery of plans to municipal treasurer.

104. Every person who is required to lodge with the Registrar a plan or map of any survey or sub-division of land in any municipality shall at the same time deposit with the said Registrar a duplicate of such plan or map, and the Registrar shall endorse thereon a certificate shewing the number of such plan or map and the date when the duplicate original thereof was filed with him, and the same shall upon request and without any fee being chargeable in respect thereof, be delivered by the Registrar to the treasurer or assessment commissioner of the local municipality in which such land is situate. The Registrar shall not register any such plan or map unless and until a duplicate thereof is deposited in accordance with the provisions hereof.

*Re-registration where Registry Books lost, etc.*

Re-registration in case registry books or papers are lost or destroyed.

105. (1) In any case where the registry books and papers were before the fourth day of March, 1868, lost or destroyed and the memorials are not forthcoming, upon proof being made to that effect before a Judge of any Court of Record in this Province to the satisfaction of the Judge as evidenced by a certificate under his hand, it shall be lawful for the Registrar for the registry division where the lands are situate to register the instrument upon production thereof, and no further proof shall be required by the Registrar than the original certificate of registration endorsed on such instrument; and any such instrument shall have priority according to the date of the original certificate.

(2) The instrument shall be filed away by the Registrar and preserved with the records of his office, and in case memorials have not been copied into the registry books in their proper order, the inspector may cause the same to be entered in proper books to be procured for the purpose, in the same manner as provided in section 29 of this Act, and the Registrar shall be paid therefor in the same manner as under sub-section 7 of section 111 of this Act. R. S. O. 1887, c. 114, s. 89.

*Defects in Registration cured.*

Registration made before 4th March, 1868, not to be deemed void.

106. No registration of any deed or other instrument made before the fourth day of March, 1868, shall be deemed or adjudged void by reason of any defect in name or names, residence or residences, addition or additions of the witness or witnesses to the deed or instrument being improperly given

(h) *Re* Waldie & Village of Burlington, 13 A. R. 108 (1886).

or described in the registered memorial thereof, or being either in part or altogether omitted from such memorial; or by reason of any clerical error or omission of a formal or technical character therein; and all registrations before the said day effected in separate registry books of unincorporated villages, are hereby confirmed, where the law has been otherwise complied with; and such separate registry books shall be taken and held to form part of the registry books of the municipality of which the unincorporated village forms a part; but such books shall not be further used. R. S. O. 1887, c. 114, s. 90.

for certain defects.

Registration in books for unincorporated villages.

"Fourth day of March, 1868":—Date of assent to 31 V. c. 20 (O.).

The registration of instruments in full was provided for by 29 V. c. 24 (Can.).

For validity and effect of registration in case of defective certificate of married woman, see *Beattie v. Mutton* (i).

107. The registration of an instrument had before the twenty-ninth day of March, 1873, shall not be deemed void by reason of any defect in the proof for registration; but this section shall not apply to any matter or fact adjudged or decided upon before the said date by any Court of competent jurisdiction in that behalf. R. S. O. 1887, c. 114, s. 91.

Defective registrations before 29th March, 1873, not to be deemed void.

108. No registration or entry made before the said last mentioned date shall be adjudged or held to be void by reason of the Registrar having failed or omitted to make or sign the certificate of entry, discharge or registration required to be made in the margin of or elsewhere in the registry books or other books of entries; and in case of such failure or omission, the certificate may be made or signed by any subsequent Registrar and shall have the same force and effect as if it had been made or signed by the Registrar whose duty it was to have made or signed it. R. S. O. 1887, c. 114, s. 92.

Registrations, etc., not to be deemed void by absence of certificates, etc., in margin of books.

109. (1) In case a part or parts of any township or townships as originally laid out, surveyed and named, had before the said last mentioned date been made or erected into a new township, but nevertheless the registrations of instruments affecting or respecting land in said first mentioned township or townships, and the registry books and indexes therefor and relating thereto continued to be and were on the said date used, made, kept, entered and registered for and of said first mentioned

The case of part of a township made part of a new township without change of registry books.

(i) 14 Gr. 686.

township or townships, and as if the same had continued to be as so originally laid out, surveyed and named, then and in every such case, and for and in respect of all matters and purposes of or relating to any such instrument either before or after the said date and any and all such registrations, registry books and indexes, and the description therein of any land or premises, said first mentioned township or townships shall be deemed, considered and taken as if the same had continued to be and remained as so originally laid out, surveyed and named.

Proviso.

(2) Nothing in this section contained shall be deemed or taken as relating to or affecting any incorporated town or village, or the land therein, or the registration of any instrument respecting the same, from or after the time of the incorporation of said town or village.

Proviso.

(3) Nothing in this section contained shall impair or make defective any instrument or the registration thereof, because of any land being therein described or mentioned as situate in such new township. R. S. O. 1887, c. 114, s. 93.

*List of Crown Grants to be furnished to Registrar.*

Provincial Secretary to furnish statement of Crown grants once every three months. Maps to be furnished by Commissioner of Crown Lands.

110. The Provincial Secretary shall once in every three months, furnish to each Registrar a statement containing a list of the names of all persons to whom patents have issued from the Crown for grants of land within the county since the former statements, and of all persons whose patents have been cancelled, since the former statements, and with such general or particular descriptions, as the case may require; and the Commissioner of Crown Lands shall furnish copies of all plans or maps of towns and townships within the same, which have not been already furnished, and in cases where no proper survey of any township has been made he may cause a proper survey and plan thereof to be made and furnished. R. S. O. 1887, c. 114, s. 91. See also R. S. O. c. 24, ss. 35-37.

*Crown grants :—See sections 2, 68 and 84, supra; also Nicholson v. Page (j).*

FEES OF REGISTRARS.

Fees.

111. Every Registrar shall be allowed the following fees for the following services, and no more :

*Other fees than in section 111 mentioned :—See section 71, supra, for fee for registering letters of administration*

(j) 27 U. C. R. 318.

under Devolution of Estates Act; also 57 V. c. 35, *infra*, for fee for registration of mortgage not in full, and of notice of sale under power. For fees for deposits of title papers, see R. S. O. 1887, c. 115, ss. 7 & 8, *supra*. For fees for registration of receipts, see 53 V. c. 31, *supra*.

*Jurisdiction of Province; are the fees payable to the registrar a tax?*—"If any one is unwilling to pay what is demanded, either because he supposes the demand to be illegal, or unreasonable, or for any cause short of the assertion of a right to have his deed registered without paying, he can avoid the payment by keeping his deed unregistered. Registration is not compulsory. There are, no doubt, risks to be run by neglecting to register; but the law that created them is beyond question *intra vires*. When a person, then, decides to register and pays the price fixed for the service, or avails himself of the registration system in any other way as by investigating a registered title, and pays for the search, there is no reason to be found for saying, nor has it been suggested, that he could have any pretence for recovering back what he has paid. The payment is neither immoral nor illegal.

"I think it is a mistake to call it a tax at all. In the one case it is the charge made by legislative authority for a service actually done. In the other it is the appropriation of the money to the remuneration or reimbursement of the parties or bodies politic who take part in rendering the service.

"But, if it can be properly called a tax, it is clearly a direct tax, whether we regard the simple fee for one registration or the surplus payable at the end of the year to the municipality" (k)

(1) For the necessary entries and certificate in registering every instrument other than those hereinafter specially provided for, including among such certificates the certificate on the

For registrations generally.

(k) Patterson, J.A., in *County of Hastings v. Ponton*, 5 A. R. 546 (1880).

duplicate, if any, forty cents; and for registering every instrument, other than those hereinafter specially provided for, 81;

But in case the said instrument exceeds seven hundred words, then at the rate of fifteen cents for each additional one hundred words or the fractional part thereof, up to fourteen hundred words, and at the rate of ten cents for each additional hundred words or fractional part thereof over fourteen hundred.

If the instrument includes different lots in different localities.

And if the said instrument embraces different lots or parcels of land, situate in different municipalities in the same county, the registration and copying of such instrument together with all necessary entries and certificates in connection therewith, shall be considered separate and distinct registrations for each municipality in which the land is situate, and shall be paid for as follows: Where the aggregate copying does not exceed seven hundred words, \$1.40; where the aggregate copying exceeds seven hundred words, the sum of fifteen cents for every hundred words or fractional part thereof up to fourteen hundred words, in addition to the said sum of \$1.40; and where the aggregate copying exceeds fourteen hundred words the sum of ten cents for every hundred words or fractional part thereof in addition to the above charges; the said fees shall include all certificates and necessary entries but in case the said instrument embraces more than four different lots or parcels of land in the same municipality, the Registrar shall be allowed a fee of 5 cents for entering each lot or parcel in excess of four, but not to exceed \$5 for such entries. 55 V. c. 30, s. 7.

*Certificate*:—Cf. *Keele v. Ridout* (l).

*Different lots in different municipalities*:—Cf. *Re Lount* (m)

*Registration in full*:—See 57 V. c. 35; cf. *Ward v. Midland Ry. Co.* (n).

For fees for registration under Middlesex Act, consult *Munton v. Lord Truro* (o).

*Who pays the costs of registering mortgage?*—See *Sweetnam v. Sweetnam* (p).

(l) 5 U. C. R. 240 (1848).

(m) 11 U. C. C. P. 97 (1861).

(n) 35 U. C. R. 120 (1874).

(o) 17 Q. B. D. 783.

(p) 6 P. R. 83. The mortgagor, even when he is a purchaser giving mortgage to secure payment of purchase money.



(2) For searching the registry books and indexes relating to the title of any lot or part of a lot of land as originally patented by the Crown, or as afterwards subdivided into smaller lots, shewn by any registered map or plan thereof, when not exceeding four references, twenty-five cents, and five cents for every additional reference; but in no case shall a general search into the title to any particular lot, piece or parcel of land exceed the sum of \$2. A 'reference' under this sub-section shall mean a search of a copy of an instrument in the register, and if the abstract indexes only are examined, the total fee for searching any such lot or part of a lot including four references, shall be twenty-five cents. The word 'lot' shall mean one parcel of land as originally patented by the Crown and where such parcel has been subdivided shall include any one of the lots in any such subdivision or re-subdivision, a plan of which has been registered. No person shall make copies of or extracts from any instruments, documents, books, papers or records in the registry office, or of any matter contained therein, to an extent in the aggregate exceeding 300 words for any one lot or part of a lot, except on payment (in addition to the fees for search) of 5 cents for each 100 words or fraction thereof in excess of said 300 words.

For searches  
as to title.

"*Lot.*"—The definition contained in this section of the word "lot" is new legislation. It does not, however, seem to affect the decision in *Morse v. Lamb* (q), which relates to the fees chargeable by the registrar for an abstract or search where a mortgagor has filed a plan of subdivision without the assent or ratification of the mortgagee. According to this decision "the whole thing depends upon what is required of the registrar." If what is required is an abstract of all or some of the subdivided lots then the registrar would be entitled to charge as for a search on each subdivided lot. But, if what is required is an abstract of the lots described in the mortgage, then the registrar may charge for a search only on such lots; although in order to prepare his abstract it may be necessary to examine or search as to every subdivided lot. *Morse v. Lamb*, *supra*, was a case of this latter kind; the registration was for an "abstract of all instruments which appear to have been registered in the Registry Office for

(q) 23 O. R. 167 (1893), Robertson, J.; reversed, *ib.* 608.

the County of York upon lot No. 7 and that part of lot No. 6 in the first concession east of Yonge Street in the Township of York, described in mortgage No. 22992," etc. As the[mortgaged property was subdivided into 365 lots by the mortgagors, the method to be chosen of computing the Registrar's fees was a matter of some little importance. Robertson, J., came to this decision :—

"I cannot in this case arrive at any other conclusion than that the Registrar is entitled only to charge for preparing the abstract: *First*, for a *general search* of two dollars on each lot mentioned in the mortgages; *Second*, for the abstract, twenty-five cents for the first one hundred words, and fifteen cents for every additional hundred words, as provided in sub-sections 2 and 4, of section 95 of the Act."

This decision was reversed, not so as to affect the above principle, "that the whole thing depends upon what is required of the Registrar"; but on the ground that the practice in the Master's office and the verbal understanding between the parties (though not the written requisition), required a certificate from the registrar, not only as to the township lots, but also as to the subdivided lots (*r*).

*Registry book and indexes; abstract index*:—The abstract index has been a cause of considerable doubt and variation in the reckoning of registrar's fees; the most satisfactory treatment of it is in the following decision of Patterson, J.A. :—

"The abstract index was first established under the Act of 1865. Before that time the law had required an alphabetical index of the names of grantors and grantees, but although there always was what is sometimes called a figure index, or a list kept in connection with each lot, etc., as granted, of the numbers of the registered instruments

(*r*) 23 O. R. 610 (1893). Boyd, C.

affecting that lot, I have not been able to find any statutory direction for keeping it. Up to 1865, from, I believe, 1853, one item of the tariff of fees for registrars was in this form: 'For searching the records relating to the title of any lot,' etc. The Act of 1865, which established the abstract index, altered the expression making it 'For searching the *registry books and indexes* relating to the title,' etc., and that form of expression has been retained (R. S. O. c. 111, s. 92). These indexes do not include the alphabetical index, for searching which a separate fee is provided.

"In the fourth particular in question, I think the defendant was decidedly unwarranted in the charge he made.

"He was asked to exhibit an abstract index, twenty-five cents being tendered for the search; but he demanded and received two dollars as for a general search, because one hundred and eighty instruments were abstracted on that index, treating his production of the index as a reference by him to each of these instruments or entries. I have already said all that is necessary to show my opinion that the plaintiff had a right to inspect the index, and from that it follows that one sum of twenty-five cents was all that I think the defendant was entitled to" (s).

*Total fee shall be 25 cents :—See Ross v. McLay (t).*

(3) For searching, if specially required, the alphabetical index of names referred to in section 37 as to each name in the books of any one township, or other legally defined municipality in the county, twenty-five cents; but if a general search as to any such name is made throughout the county, the aggregate of fees for such search shall not exceed \$1.

Searching  
Alphabeti-  
cal Index.

General  
search.

*Reason of search of alphabetical index :—*The following decision in *MacNamara v. McLay (u)* shows the

(s) *MacNamara v. McLay*, 8 A. R. 319 (1883).

(t) 26 U. C. C. P. 190 (1876).

(u) 8 A. R. 338 (1883). *Patterson, J. A.*

utility of the alphabetical index and also what amounts to a special requisition for a search in it.

"The second item of complaint is for an over-charge of twenty-five cents in the sum of fifty cents. The plaintiff tells the defendant that one Jacob Bergeys owns a lot the number of which he does not know, in the Township of Brant, and he asks the defendant to tell him what incumbrances, if any, affect that lot.

"The defendant could only ascertain the lot by searching the alphabetical index. For that a fee of twenty-five cents is allowed by a separate clause from the one before quoted. The request of the plaintiff necessarily involved the request to make that search. The duty, under s. 23 (I refer to the Revised Statute), was to search concerning instruments registered mentioning any lot, etc.. The applicant's part was to name the lot concerning which the search was to be made. The registrar's answer to the request, if nothing were involved in it more than as stated in words, would properly be, 'I cannot make the search into the title until I know the lot. Tell me the lot and I will make the search,' The search of the alphabetical index was therefore a search for the information of the plaintiff, to enable him to tell the defendant of what lot he wanted the title searched. The information having been obtained at an expense of twenty-five cents, and the lot proving to be No. 29 in the 5th concession, the plaintiff, in effect, asks what incumbrances affect No. 29, in the 5th concession of Brant; and having been furnished with that information for no further charge than one other sum of twenty-five cents, I do not see that the complaint can properly come from his side.

Abstracts of  
title.

(4) For every abstract of title to any specific parcel of land certified by the Registrar containing such particulars as to any number of the registered instruments affecting such parcel of land as the party searching may require, twenty-five cents; and when such abstract exceeds one hundred words, fifteen cents for

every additional hundred words; and for copies of instruments when required, ten cents for each hundred words. The fees for every abstract shall appear on the face thereof and shall show the items making up the amount of such fees. Where there are two or more lots for which abstracts are required and the entries on such lots are identical, the registrar shall not be entitled to make an abstract for each lot separately, but the abstracts of title to such lots shall be included in one abstract, and the fees therefor shall be the same as if the abstract applied to one lot only, except that the registrar shall be entitled in addition thereto to a fee of twenty-five cents as for a search on each lot after the first lot, and for the first lot he shall be entitled to the same fees as are now payable under this Act in respect of one lot.

(5) For each certificate furnished by the registrar, except those made under sub-sections 1 and 4 of this section, twenty-five cents; Certificates.

(6) For registration of any plan of town or village lots, including all necessary entries connected therewith, \$1; but in case the plan embraces more than twenty lots, the registrar shall be allowed a fee of five cents for each lot in excess of twenty, not to exceed in the whole \$5. Plans.

(7) For furnishing the statements and copies required under sections 32 and 35 of this Act, to be paid by the county treasurer, to which any city, town, township, village or place belongs or is attached, the sum of ten cents for every folio of one hundred words contained in such statement so furnished or copy so made; and the county treasurer shall also pay such sum as the inspector may order in writing, specifying the nature of the service under any section of this Act, for repairing any book, or copying, mounting, or binding plans under the provisions of section 35 of this Act; and towns separated from counties for municipal purposes, and cities in which no separate registry office exists shall bear a ratable proportion of the expense thereof, based on the assessment of all the municipalities within the jurisdiction of the county. Statements under sections 32 and 35.

(8) For drawing each affidavit and swearing the deponent thereto, twenty-five cents; the same fee to be allowed for administering the oath when that only is required. Affidavits.

(9) For exhibiting in the office each original registered instrument, including search for same, ten cents. Showing originals.

*The number of original must first be ascertained:—*  
The question what charge the registrar may make, when the requisitionist does not know the number of the required

original, is answered by Patterson, J.A., in *MacNamara v. McLay (v)*.

"Then as the third instance the plaintiff goes again to the defendant wishing to see an original document, the number of which he cannot state, and which the registrar cannot search for until he knows the number. His direct answer of course is, 'I cannot search till you give the number of the paper you want;' and the plaintiff has to resort to means which happen to be in his power, to find the number. He knows the names of the parties to the deed and the land affected by it. By getting the registrar to search for the abstract index of the lot he can find the number. That search is accordingly made, and the number ascertained. The charge for that search is by the statute twenty-five cents. It is a search of the abstract index, such as I have before spoken of. Then having the number, the registrar is able to search for the paper it belongs to, and having found it to produce it. Those two services, the search for the document and the production of it, are covered by one fee of ten cents: 'For exhibiting in the office each original registered instrument including search for the same, ten cents.'

"The defendant charged thirty-five cents in all. I think he was clearly entitled to both the charges. In this I differ from one of the findings, in *Ross v. McLay (w)*."

*Exhibiting original plan*:—See *Lindsay v. Corporation of City of Toronto (x)*.

Certificates of discharge of mortgage. (10) For registering each certificate of payment of mortgage money, and every other certificate excepting certificates provided for in the next succeeding sub-section, including all entries and certificates thereof, fifty cents; but in case the said certificate

(v) 8 A. R. 339 (1883).

(w) 26 U. C. C. P. 190.

(x) 25 U. C. C. P. 335 (1875).

affects more than four different lots or parcels of land, the registrar shall be allowed a fee of five cents for each lot in excess of four, not to exceed in the whole \$2 for the registration of such certificate.

(11) The registrar shall be entitled to charge for registering a certificate under section 82, including all entries in respect thereof, the same fees as are chargeable for registering a certificate of discharge of mortgage. 51 V. c. 17, s. 4.

Certificate of discharge of lien.

(12) For registering each certificate of payment of taxes, twenty-five cents.

Of payment of taxes.

(13) In abstracts and certificates where figures are used instead of words to denote dates, numbers and quantities, the same shall be charged as if each number, though composed of several figures, were but one word. R. S. O. 1887, c. 114, s. 95.

Figures.

112. When any dispute arises in regard to any question of fees under this Act, the registrar shall forthwith submit the same to the inspector, and shall thereupon notify the person interested or his agent of such submission, and the decision of the inspector upon the question submitted shall be final, unless appealed from and varied by appeal as hereinafter mentioned. All decisions given by the inspector shall be in writing, and the appeal therefrom shall be in like manner, and subject to the same rules of practice as nearly as may be as an appeal from a master in chambers or local master. 53 V. c. 30, s. 2.

Disputes as to fees.

For a case of appeal against the decision of the inspector see *Morse v. Lamb* (y).

113. Every Registrar shall keep posted up in some conspicuous place in his office a printed schedule of the fees and charges authorized under this Act. R. S. O. 1887, c. 114, s. 96.

Table of fees to be posted in Registrar's office.

114. Every Registrar shall upon request of the person for whom the service is performed, furnish a statement in detail of the fees charged by him in respect of any matter for which fees are payable under the provisions of this Act. R. S. O. 1887, c. 114, s. 97.

Registrars to give statement of fees payable in any matter.

115. Should the treasurer of any county or city in which a separate Registry Office is established, on the request of the Registrar for the duties performed according to this Act, refuse to pay the fees and allowances for any services required by this Act, the Registrar may prove and recover the same and the cost thereof from the corporation of the county or city in any Court

Recovery of fees from municipal corporations.



Evidence. of Record in Ontario; and the Inspector's certificate of the amount and of the services rendered shall be *prima facie* evidence of the right to recover. R. S. O. 1887, c. 114, s. 98.

*See Campbell v. Corporation of York and Peel (z).*

Fees payable before registration. 116. The Registrar shall not be compelled to register any instrument unless the fees authorized by this Act are first paid thereon. R. S. O. 1887, c. 114, s. 99.

*Non-payment of fees:—See Lynch v. Wilson (a).*

Registrars to keep accounts of fees. 117. (1) Every Registrar shall keep a separate book in which he shall enter, from day to day, all fees and emoluments received by him by virtue of his office, shewing separately the sums received for registering each instrument, and for searches, and for extracts or copies.

Registrar's annual returns. (2) Every Registrar shall make, up to and including the 31st day of December of the previous year, a return under oath to the Lieutenant-Governor annually on or before the 15th day of January, and such return in addition to any other information which may be required in connection therewith, shall show:

1. Total number of instruments registered and fees therefor;
2. Number uncopied and uncomparated;
3. The number of patents registered and fees therefor;
4. The number of deeds registered and fees therefor;
5. The number of mortgages registered and fees therefor;
6. The number of discharges of mortgages registered and fees therefor;
7. The number of wills registered and fees therefor;
8. The number of leases registered and fees therefor;
9. The number of abstracts and fees therefor;
10. The number of searches and fees therefor;
11. The number of mechanics' liens and fees therefor;
12. The number of all other instruments registered or filed and fees therefor;
13. Amount received for work done for which county, city, or other municipality is liable;
14. Amount received for other services not enumerated above;
15. Fees earned and not received;

(z) 26 U. C. R. 635; 27 U. C. R. 138 (1867), circuitry of action.

(a) 22 U. C. R. 226, where fees not paid. Cf. *Doutre v. Gagnon*, 13 L. C. J. 303.

10. Gross amount of fees earned for the year ;
17. Gross amount for the previous year ;
18. Amount paid to Deputy Registrar for services and amount of other charges in connection with the office paid by Registrar ;
19. Amount of surplus paid to the county or city for the year and when paid ;
20. Amount of such surplus for the previous year ;
21. Net amount received by Registrar.

(3) The return shall show (1) The number of mortgages registered during the year classified as follows :—

Class 1—The number of mortgages where the consideration is nominal or the amount not specified.

Class 2—The number of mortgages where the consideration is \$1,000 or under.

Class 3—The number of mortgages where the consideration is over \$1,000 and not exceeding \$2,000.

Class 4—The number of mortgages where the consideration is over \$2,000 and not exceeding \$5,000.

Class 5—The number of mortgages where the consideration is over \$5,000.

Such return shall also show the aggregate amount of such mortgages.

(4) Sub-sections 2 and 3 of this section shall not come into force until the first of January, 1894.

118. The Registrar shall, upon request, furnish to the clerk or the assessment commissioner of a city, a list of all absolute conveyances whereby property has been transferred, which have been registered in his office during the next preceding month, and in such list shall include the names of the grantor, the grantee, the consideration shown in such transfer, and a short description of the land conveyed ; provided that such list shall not include leases for less than twenty-one years, mortgages, discharges of mortgage, or other like instruments, and that the Registrar shall be entitled to have and receive therefor a fee of five cents for every instrument included in said list.

Registrar to furnish clerk or assessment commissioner with list of conveyances.

119. (1) Every Registrar shall be entitled to retain to his own use in each year all the fees and emoluments received by him in that year up to \$2,500. R. S. O. 1887, c. 114, s. 101.

Registrar's emolument when fees do not exceed \$2,500.

(2) Of the further fees and emoluments received by each Registrar in each year, in excess of \$2,500, not exceeding \$3,000, he shall be entitled to retain to his own use ninety per cent. and no more. R. S. O. 1887, c. 114, s. 102.

When fees are between \$2,500 and \$3,000.

When fees are between \$3,000 and \$3,500. (3) Of the further fees and emoluments received by each Registrar in each year, in excess of \$3,000, not exceeding \$3,500, he shall be entitled to retain to his own use eighty per cent. and no more. R. S. O. 1887, c. 114, s. 103.

When fees are between \$3,500 and \$4,000. (4) Of the further fees and emoluments received by each Registrar in each year, in excess of \$3,500, not exceeding \$4,000, he shall be entitled to retain to his own use seventy per cent. and no more. R. S. O. 1887, c. 114, s. 104.

When fees are between \$4,000 and \$4,500. (5) Of the further fees and emoluments received by each Registrar in each year, in excess of \$4,000, not exceeding \$4,500, he shall be entitled to retain to his own use sixty per cent. and no more. R. S. O. 1887, c. 114, s. 105.

When fees exceed \$4,500. (6) Of the further fees and emoluments received by each Registrar in each year, in excess of \$4,500, he shall be entitled to retain to his own use fifty per cent. and no more. R. S. O. 1887, c. 114, s. 106.

Applica-  
tion of sur-  
plus fees. 120. (1) On the fifteenth day of January in each year every Registrar shall transmit to the treasurer of the county or city for which, or for part of which, he is Registrar, a duplicate of the return required by this Act, and shall also pay to such treasurer for the uses of the municipality such proportion of the fees and emoluments received by him during the preceding year, as under this Act he is not entitled to retain to his own use.

Return.

(2) Where a Registry Division includes a county or part of a county, and a city or town separated from the county for municipal purposes, the amount aforesaid shall be paid to the treasurer of the county and to the treasurer of the city or town for the use of the municipality in the same proportions in which the gross fees and emoluments are derived from extracts, searches, registrations, and other charges in respect of lands situate in the county, and in respect of lands situate in the city or town. R. S. O. 1887, c. 114, s. 107.

*Sections 119, 120: Surplus to be apportioned as received:*—"The group of ss. 98-105 in R. S. O., c. 111 (b), is taken from 35 V. c. 27, the preamble of which recites that the income derived from fees in certain registry offices is excessive, and that it is 'expedient to make some provision in the premises.' These sections must be read together with section 92 (c), which regulates the fees allowed to be taken by the Registrar for services specified

(b) Now sections 119, 120, 127.

(c) Now section 111.

"The Act makes an apportionment of every single dollar received by him after a certain amount, as and when he receives it. One part he is entitled to retain to his own use. To whose use does he receive the residue? Clearly, as it seems to me, to the use of the municipality. It is not as if the Act had made an apportionment of the receipts of the year as a whole. All that is done is to delay the accounting for and payment over of the excess until the 15th January" (d).

*Method of reckoning registrar's emoluments* :—"In my judgment the meaning of the 98th section of the statute (e) is, that each Registrar is not to account to the county for any sum whatever until after he has received the sum of \$2,500; after that he is entitled to receive 90 per cent. of the excess of \$2,500 up to \$3,000, and after that 80 per cent. up to \$3,500, and so on according to the scale provided by the subsequent sections of the Act. It is argued that such a system would not only be contrary to the intention of the statute, but inequitable. I cannot subscribe to this. It must not be forgotten that before the passing of the Act of Ontario, 35 V. c. 27, the Registrars were entitled under the common law to all the fees and emoluments in anywise appertaining to their said office, and in construing the statute which encroaches upon these rights, and especially in cases like this when the deceased held and enjoyed the office for more than fifty years before the statute was passed, I think the Registrars have the right to say that that statute shall be construed strictly, and its language 'neither extended beyond its natural and proper meaning in order to supply omissions or defects, nor strained to meet the justice of his particular case,' as was said by Burton, J.A., in the *Corporation of Bruce v. McLay*, 11 A. R. at p. 479" (f).

(d) Osler, J.A., in *Bruce v. McLay*, 11 A. R. 480 (1884), following *County of Hastings v. Ponton*, 5 A. R. 543.

(e) R. S. O. 1887, c. 111, now section 119.

(f) Robertson, J., in *Gray v. Ingersoll*, 16 O. R. 194 (1888). Cf. decision of Burton, J.A., in *Bruce v. McLay*, 11 A. R. 477 (1884).

A concrete instance showing the importance of the method used in these calculations is the case of *Gray v. Ingersoll (g)*. Ingersoll, the deceased Registrar, had received during 1886, up to his death, \$4,042.75.

"His deputy received from August 9th to August 25th, 1886, \$272.65; and the present registrar received up to December 31st, 1886, \$2,444.85, making a total of \$6,760.25.

"The Master allowed the county on the amounts received by each of the several persons who were registrars and acting registrar for the year *separately*, which has the effect of letting the last named out, and Mr. Ingersoll's contributions stand thus:—Amount received by Mr. Ingersoll, \$4,042.75; amount allowable under the statute, \$3,725.75; leaving amount due the county, \$317." The Court upheld the Master's decision.

The municipality had followed a different mode of computation and urged "that the account should be taken by allowing one salary to all these officers, based on the sum of \$6,760.25, making the deductions on such amount, apportioning such deductions *pro rata* among each incumbent." This would have made a considerable difference in favour of the municipality.

*Return where registrar dismissed before end of year*:—In *Bruce v. McLay (h)*, the registrar being dismissed before the end of the year, ingeniously attempted to turn that circumstance to his advantage:—

"He contended that under section 92 (i), the fees were payable to the registrar for himself, and it was only in the event of his being allowed to serve the full year, that is, up to the 31st December, 1882, it could be ascertained what amount he would be actually entitled to; and the amount received up to the time of dismissal, though greater than

(g) *Ib.*

(h) 3 O. R. 23 (1883).

(i) Now section 111.

the amount he was then entitled to retain, might not be greater than his portion of the fees would have been under his management up to the end of the year. This argument is not entitled to prevail.

"The right of the municipality does not depend in any manner upon the return. It would not bind it as to the amount alleged therein to be received, which could or might be shewn quite irrespective of such return, and the plaintiffs if a return had been made, would be at liberty to dispute its correctness (*j*).

"It is not necessary, I think, to consider whether, when a registrar has ceased to fill the office before 15th January in any year, he could be compelled to send into the Lieutenant-Governor a duplicate of the return required under section 97; but there can be no sound reason why he should not be bound to pay over at that time the moneys which he has always held, not as his own, but as a mere custodian for the municipality, or its treasurer" (*k*).

*Sureties of registrar*:—For liability of sureties of registrar as affected by changes in the law relating to the retention by him of fees, see *Corporation of Middlesex v. Smallman* (*l*).

**121.** Of the net income of each year every registrar shall pay to the Provincial Treasurer for the purposes mentioned in the *Act respecting Fees of Certain Public Officers*, passed in the 55th year of Her Majesty's reign, the following percentages on the net income over \$2,500, viz:—

Percentage  
of fees pay-  
able to  
Provincial  
Treasurer.  
55 V. c. 17.

- (a) On the excess over \$2,500, not exceeding \$3,000, ten per cent. thereof.
- (b) On the excess over \$3,000, not exceeding \$3,500, twenty per cent. thereof.
- (c) On the excess over \$3,500, not exceeding \$4,000, thirty per cent. thereof.
- (d) On the excess over \$4,000, forty per cent. thereof. 55 V. c. 17, s. 17.

(j) *Ib.*, per Cameron, J.

(k) *Ib.*, per Burton, J. A., at 11 A. R. 477.

(l) 20 O. R. 487 (1891); Rose, J.

"Net income" meaning of.

**122.** For the purposes of this Act, "net income" shall mean the excess of all fees and emoluments, including receipts in the current year, whether on account of the earnings or salary of such year or of any former year or years after the 1st day of January, 1893, by the Registrar, after deducting the disbursements incident to the business of his office and after payment to the municipality of the proportion of fees provided by section 119. 55 V. c. 17, s. 1.

Returns to Provincial Treasurer.

**123.** On the 15th day of January in each year every Registrar shall transmit to the Provincial Treasurer a return under oath of all fees and emoluments, including salary, if any, whether received in cash or not, and also the disbursements incident to the business of his office up to and including the 31st day of December of the previous year, and shall with such return transmit to the said Provincial Treasurer such proportion of the fees and emoluments received by him during the preceding year as he is required under this Act to pay to the said treasurer. 55 V. c. 17, s. 10.

Fees for services under election laws.

**124.** Nothing herein contained shall be construed to apply to the fees or emoluments of any Registrar received on account of services as returning officer under the election Acts of the Province of Ontario or Canada. 55 V. c. 17, s. 12.

Lieutenant-Governor may make rules and regulations.

**125.** The Lieutenant-Governor in Council may make rules and regulations for the management of the office of Registrar, and may, by such rules, confer on the inspector such powers as may be deemed necessary for carrying out the provisions of this Act, and all other Acts relating to the duties of Registrars. All such rules and regulations shall be laid before the Legislative Assembly within the first ten days of the session after the making thereof. 55 V. c. 17, s. 13.

Disbursements subject to revision of inspectors.

**126.** The disbursements of the Registrars shall be subject to the revision of the inspector, and for the purposes of such revision the inspector shall have power to take evidence and examine witnesses under oath. 55 V. c. 17, s. 14.

Fees under ss. 32 and 35, etc., not included in estimating Registrar's fees.

**127.** In the fees and emoluments mentioned in sections 119, 120, 121, and 122 of this Act, shall not be included any sums receivable from the municipality for the preparation of abstract indexes, or for work done under sections 32 or 35 of this Act. R. S. O. 1887, c. 114, s. 108.

#### INSPECTOR OF REGISTRY OFFICES.

Appointment of Inspector and his duties.

**128.** The Lieutenant-Governor may, from time to time appoint an Inspector of Registry Offices, whose duty shall be,

Inspection of building.

(1) To make a personal inspection of the building in which each office is kept, and of the books, deeds, memorials and other instruments in each registry office ;



(2) To see that the proper books are provided, that they are in good order and condition, that the proper entries and registrations are made therein in a proper manner and in a due and proper form and order, that the indexes are properly kept, and that all the memorials and other instruments are duly endorsed and certified, and preserved ;

Books, etc.

(3) To ascertain that the office is kept duly open at and for the proper times, and that it is at all times duly attended to by the registrar or his deputy ;

Office hours.

(4) To settle on some uniform device for the official seals, and to see that the Registrars supply themselves therewith ;

Seals of office.

(5) To inspect all new abstract and alphabetical indexes, and to settle and certify the sums, if any, chargeable therefor ;

New indexes.

(6) To ascertain whether the proper plans required by this Act have been filed in the several Registry Offices, and where necessary, to enforce the provisions of the law in that respect, and he may instruct the County Crown Attorney to take the necessary proceedings for that purpose ;

Plans.

(7) To report upon any vacancies by death or otherwise, in the offices of Registrar and Deputy Registrar ;

Reporting vacancies.

(8) To inform the Registrar how and in what manner he shall do any particular act or amend or correct whatever he may find amiss ; and in case he finds the work improperly performed by any Registrar, he shall have power to order a new book or books to be prepared and completed by the Registrar at his own expense ;

Instruction of Registrar in his duties.

(9) To ascertain the sufficiency or insufficiency of the sureties for the Registrar, and whether they are living or dead ; and

Sufficiency or insufficiency of sureties.

(10) To report upon all such matters, as expeditiously as may be, to the Lieutenant-Governor for his information and decision. R. S. O. 1887, c. 114, s. 109.

Reporting to Lieutenant-Governor.

129. The Registrars shall transmit to the inspector of registry offices such particulars with reference to the business of such offices as the said inspector may require. 53 V. c. 30, s. 11.

Registrar to furnish information to inspector.

130. In the event of the work of any registry office being in arrear, and it appearing to the inspector that no sufficient reason is given therefore, the inspector shall employ such assistance as he may deem necessary to perform the work so in arrear, and the cost of such assistance shall be payable by the Registrar to the parties entitled, on the certificate of the inspector.

Duty of inspector on finding work in arrear.

131. A sum not exceeding \$2,000 per annum, which shall include all travelling and other expenses, shall be allowed to the inspector of registry offices. R. S. O. 1887, c. 114, s. 110.

Pay of inspector.

For section 132, *see* 57 V. c. 35, *infra*.

## SCHEDULE A.

(Section 13.)

## FORM OF COVENANT OF REGISTRAR.

Know all men by these presents, that we, *A. B.*, Registrar of  
Esquire, and *C. D.*, of Esquire, and *E. F.*,  
Esquire, do hereby jointly and severally for our and each of our heirs, executors and administrators, covenant and promise, that the said *A. B.*, as Registrar of  
shall well, truly and faithfully perform the duties and obligations of his office as such Registrar, and that neither he nor his Deputy shall negligently or wilfully misconduct himself in his said office to the damage of any person or persons whomsoever; nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than the following, that is to say: against the said *A. B.* in the whole, \$ [the amount fixed by Order in Council]; against the said *C. D.* and *E. F.*, \$ respectively [the amount fixed by Order in Council for each].

In witness whereof we have hereunto set our hands and seals this  
day of , A.D. 18 .

Signed, sealed and delivered in presence of }

## SCHEDULE B.

(Section 13.)

## FORM OF AFFIDAVIT OF JUSTIFICATION.

County of } I, *A. B.*, of one of the sureties  
To wit: } in the annexed covenant named, make oath and say as follows :

I am seised and possessed to my own use of real (or real and personal) estate in Ontario of the actual value of \$ over and above all charges upon, or incumbrances affecting the same.

2. (Where the party has real estate.) The said real estate consists of (describing the property.)

3. I am worth (the amount for which the party has become liable by the covenant) \$ over and above my just debts.

4. My post office address is as follows : (insert name of post office).

Sworn before me at , in the  
County of , this  
day of , A.D. 18 .

## SCHEDULE C.

(Section 20.)

## FORM OF REGISTRAR'S OATH OF OFFICE.

## ONTARIO.

County of } I (*name and describe deponent*), having been appointed by  
 To wit: } the Lieutenant-Governor to the office of Registrar, in and for the  
 ( *name of Registry Division, etc.* ) do swear that I will well, truly  
 and faithfully perform and execute all duties required of me, under the laws of  
 this Province, pertaining to the said office, so long as I continue therein, and  
 that I have not given directly or indirectly, nor authorized any person to  
 give, any money gratuity or reward whatsoever for procuring the said office  
 for me.

Sworn before us at  
 the                      day of                      , A.D. 18     .

A. B., J.P., }  
 C. D., J.P., } In and for the said County.

## SCHEDULE D.

(Section 31.)

## FORM OF CERTIFICATE RESPECTING REGISTRY BOOKS.

This register contains                      pages exclusive of index, and  
 is to be used in and for the City (*or* Town, Incorporated Village or Township)  
 of                      , in the County of                      , for the enregistration of  
 deeds, duplicates, and other instruments under the provisions of *The Registry  
 Act, 1893*, and is provided in pursuance of the requirements of the said Act.

Dated this                      day of                      , A.D. 18     .

A. B., Judge of the County Court of                      *or*

A. B., Warden of the County of

## SCHEDULE E.

(Section 35.)

## FORM OF ABSTRACT INDEX.

Township of Yarmouth, Lot No. , in the 1st Concession.

1	2	3	4	5	6	7	8	9
No. of Instru- ment.	Instru- ment.	Its date.	Date of Registry.	Grantor.	Grantee.	Quantity of Land.	Consideration in conveyance or amount of mort- gage money.	Remarks.
54	Patent. B. & S.	21st February, 1829	.....	Crown	John Jones.	All of said lot	\$300	
72	B. & S.	10th January, 1835	11 January, 1835	David Brown and wife.	Geo. Smith.	N. $\frac{1}{2}$ .	\$400	
449	B. & S.	30th May, 1830	15 May, 1838	John Jones and wife.	D'v'd Brown	N. $\frac{1}{2}$ .	\$500	
461	B. & S.	23rd June, 1840	23rd June, 1840	George Smith	Chas. Gates.	N. $\frac{1}{2}$ .	\$752	
490	M.	do	do	Charles Gates and wife.	Geo. Smith.	N. $\frac{1}{2}$ .	\$500	
1069	B. & S.	20th October, 1841	20th October, 1841	John Jones and wife.	Chas. Gates.	S. $\frac{1}{2}$ .	\$200	
2540	D. M.	23rd June, 1842	1st July, 1842	George Smith	Chas. Gates.	N. $\frac{1}{2}$ .		D. of 461
2875	B. & S.	1st May, 1856	1st May, 1856	Charles Gates and wife.	Alex. Eric.	All.	\$800	
	B. & S.	1st May, 1860	1st May, 1860	Alexander Eric.	James Eric.	E. $\frac{1}{2}$ of the N. $\frac{1}{2}$ or N.E. $\frac{1}{4}$ .	\$1 and nat. love and affection.	

SCHEDULE F.

(Section 37.)

FORM OF ALPHABETICAL INDEX.

No. of Instrument.	GRANTOR.	GRANTEE.	No. of Instrument.	GRANTEE.	GRANTOR.
	A.			A.	
1011.	Abbott, George.	Black, John.	1029.	Appleton, James.	Buck, Peter.
1015.	Allen, William.	Cook, Edward.	1039.	Angus, Robert.	Cooms, Joseph.
1017.	Anderson, James.	Smith, Thomas.	1038.	Anson, William.	Whalks, Jane.
	B.			B.	
1004.	Barnard, John.	Green, Edward.	1011.	Black, John.	Abbott, George.
1020.	Burns, Robert.	Cassels, George.	1070.	Benson, Jessie.	Crooks, Nelson.
1029.	Buck, Peter.	Appleton, James.	1038.	Barrows, Joseph.	Hinds, Henry.
	C.			C.	
1039.	Cooms, Joseph.	Angus, Robert.	1015.	Cook, Edward.	Allen, William.
1048.	Coffey, Richard.	Ingram, Benjamin.	1020.	Cassels, George.	Burns, Robert.
1070.	Crooks, Nelson.	Benson, Jessie.	1118.	Caster, Simon.	Philip, Richard.

## SCHEDULE G.

(Section 40.)

## FORM OF AFFIDAVIT OF EXECUTION.

County of \_\_\_\_\_ } I, \_\_\_\_\_, of \_\_\_\_\_,  
 To Wit. } the \_\_\_\_\_ of \_\_\_\_\_ in the \_\_\_\_\_,  
 and say: } County of \_\_\_\_\_, make oath

1. That I was personally present and did see the annexed (or within) (and duplicate, if any, according to the fact) duly signed, sealed and executed by \_\_\_\_\_ and the parties thereto.
2. That the said \_\_\_\_\_ (and duplicate, if any, according to the fact) were executed at the \_\_\_\_\_ of \_\_\_\_\_.
3. That I know the said parties (or one or more of them, according to the fact).
4. That I am a subscribing witness to the said (and duplicate, according to the fact).

## SCHEDULE H.

(Section 43.)

## AFFIDAVIT OF EXECUTION.

County of \_\_\_\_\_ } I, A. B., of the \_\_\_\_\_, in the county  
 To wit: } of \_\_\_\_\_ (addition) make oath and say:

1. That I was personally present and did see the annexed (or within) instrument (and duplicate, if any, according to the fact), duly signed, sealed and executed by \_\_\_\_\_ and the parties thereto.
  2. That the said instrument was read over in my presence and explained to the said, \_\_\_\_\_ and that he appeared perfectly to understand the same, and was informed that it might be registered as an incumbrance on his lands.
  3. That the said instrument (and duplicate, if any, according to the fact), was executed at the \_\_\_\_\_ of \_\_\_\_\_.
  4. That I know the said parties (or one or more of them, according to the fact).
  5. That I am a subscribing witness to the said \_\_\_\_\_ (and duplicate, according to the fact).
- Sworn, etc.

## SCHEDULE I.

(Section 50.)

## CERTIFICATE OF COUNTY JUDGE IN LIEU OF AFFIDAVIT OF EXECUTION.

County of } I,  
 To Wit : } Judge of the County Court of the County of  
 , certify that, from the proof adduced by (name the  
 person producing the proof and state the evidence given) I am satisfied of the due  
 execution of the within instrument (or of the instrument whereof the within is  
 a copy, memorial or duplicate, as the case may be).

As witness my hand at the  
 day of A. D., 18 .  
 A. B.,  
 Judge of the County Court of

## SCHEDULE J.

(Section 63.)

## FORM OF CERTIFICATE OF REGISTRATION.

I certify that the within is duly entered and  
 registered in the Registry Office for the of the County  
 of in Book for the of  
 at o'clock of the day of  
 A. D. 18 .  
 Number

Registrar.  
 or Deputy Registrar.

## SCHEDULE K.

(Section 67.)

## FORM OF MINUTE OF REGISTRATION.

Entered and Registered this day of  
 A. D. at o'clock.



## SCHEDULE L.

(Section 76.)

## FORM OF DISCHARGE OF MORTGAGE.

To the Registrar of the County of \_\_\_\_\_ :

I, \_\_\_\_\_, of the \_\_\_\_\_, do certify that \_\_\_\_\_ has satisfied all money due on, or to grow due on (or has satisfied the sum of \_\_\_\_\_ mentioned in), a certain mortgage made by \_\_\_\_\_ of \_\_\_\_\_, to \_\_\_\_\_, which mortgage bears date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, and was registered in the Registry Office for the County of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, at \_\_\_\_\_ minutes past \_\_\_\_\_ o'clock, \_\_\_\_\_ noon, in Liber \_\_\_\_\_ tor \_\_\_\_\_ as No. \_\_\_\_\_ (here mention the day and date of registration of each assignment thereof and the names of the parties, —or mention that such mortgage has not been assigned as the fact may be) and that I am the person entitled by law to receive the money, and that such mortgage, (or such sum of money as aforesaid, or such part of the lands as is herein particularly described, that is to say : \_\_\_\_\_) is therefore discharged.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 18\_\_\_\_.

One witness. \_\_\_\_\_

A. B.

## SCHEDULE M.

(Section 80.)

## FORM OF CERTIFICATE OF DISCHARGE OF MORTGAGE BY SHERIFF, ETC.

To the Registrar of the County (Division or City, as the case may be) of \_\_\_\_\_ :

I, A. B., of \_\_\_\_\_, Sheriff of the County of \_\_\_\_\_ or Bailiff of the (number) Division Court of the County (or City, as the case may be) of \_\_\_\_\_ do certify that by virtue of a writ of execution wherein C. D., is plaintiff and E. F., defendant, issued out of Her Majesty's High Court of Justice (or as the case may be) and to me directed, I seized a certain mortgage made by one J. H. of (as described in said mortgage) bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18\_\_\_\_, and registered at \_\_\_\_\_ of the clock in the forenoon, Liber \_\_\_\_\_, for No. \_\_\_\_\_ (as the case may be) of the \_\_\_\_\_ day of \_\_\_\_\_ in the same year (as the case may be) to E. F. of \_\_\_\_\_ (as described in the mortgage) the defendant in the said writ of execution named, and such mortgage has not been assigned (or has been assigned to the defendant and such assignment has been registered as follows : (Here set out date and registration of assignment) and I do further certify that I have levied from the said mortgagor, his executors, administrators or assigns (as the case may be) the full

amount of said mortgage, (or \$            parcel of said mortgage), and that such mortgage is therefore discharged (or that such mortgage is, as to \$            parcel of the moneys thereby payable, discharged).

As witness my hand and seal of office (or the seal of the said Court.)

This            day of            , A.D. 18   .

Witness,            }

L. M.

Signed,

A. B.

### SCHEDULE N.

(Section 82.)

#### CERTIFICATE OF DISCHARGE.

To the Registrar of the County of

County of            . } I,            of the            in the County  
To wit :            of            (addition)            do hereby certify  
that            , of the            of            , in the county of            (addi-  
tion)            , has satisfied all money due or to grow due on (or has satisfied  
the sum of \$            mentioned in) a certain instrument made  
   of            to            , which instrument bears date  
the            day of            , A.D. 18   , and was registered in the registry  
office for the County of            on the            day of            , A.D.  
18   , at            minutes past            o'clock,            noon, in Liber            for  
   , as No.            (here mention the day and date of registration of each  
assignment thereof, and the names of the parties, or mention that such instru-  
ment has not been assigned as the fact may be), and that I am the person entitled  
by law to receive the money, and that such instrument (or such sum of money  
as aforesaid, or such part of the lands as is herein particularly described, that  
is to say :            ,) is therefore discharged.

Witness my hand this            day of            , A.D. 18   .

One witness,            }

A. B.

Affidavit of execution same as in discharge of mortgage.

### SCHEDULE O.

(Section 96.)

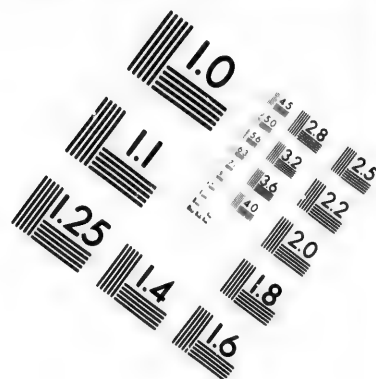
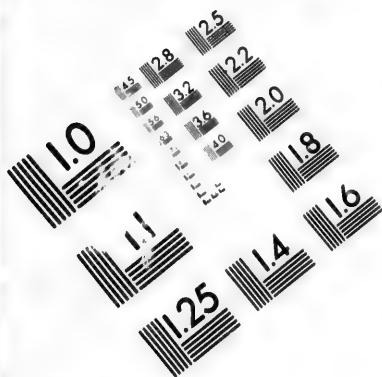
#### FORM OF SURVEYOR'S CERTIFICATE OF PLAN.

I hereby certify that this plan accurately shews the manner in which the land included therein has been surveyed and subdivided by me; and that the said plan is prepared in accordance with the provisions of *The Registry Act, 1893*.

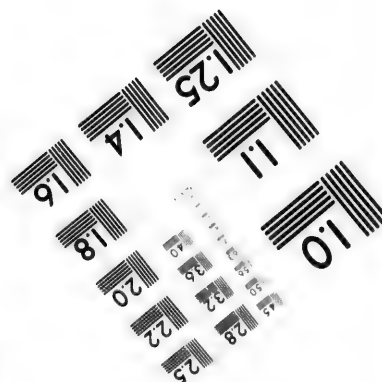
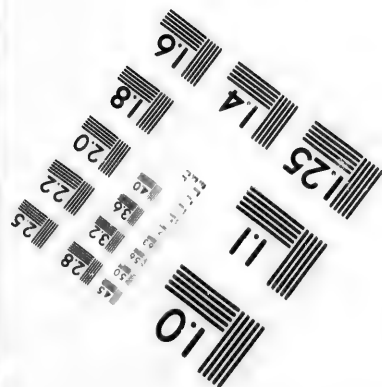
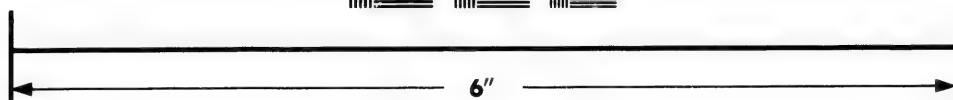
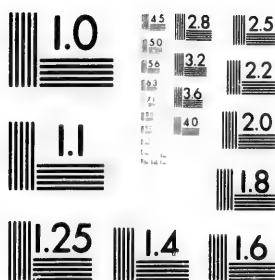
Dated            , 18   .

A. B.,

Provincial Land Surveyor.



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## SCHEDULE P.

## LIST OF REGISTRY DIVISIONS.

*Part 1.*

The undermentioned TERRITORIAL DIVISIONS as set forth in Chapter 5 of the Revised Statutes of Ontario, 1887 (except as otherwise mentioned), constitute separate registry divisions:—

## The Counties of—

- |  |                           |
|--|---------------------------|
| 1. Brant.  | 16. Lambton.              |
| 2. Bruce.  | 17. Leeds.                |
| 3. Carleton, excepting the City of<br>Ottawa.    | 18. Lennox and Addington. |
| 4. Dufferin.                                     | 19. Lincoln.              |
| 5. Dundas.                                       | 20. Norfolk.              |
| 6. Elgin.  | 21. Ontario.              |
| 7. Essex.  | 22. Oxford.               |
| 8. Frontenac, excepting the City of<br>Kingston. | 23. Peel.                 |
| 9. Glengarry.                                    | 24. Peterborough.         |
| 10. Grenville.                                   | 25. Prescott.             |
| 11. Haldimand.                                   | 26. Prince Edward.        |
| 12. Halton.                                      | 27. Renfrew.              |
| 13. Hastings.                                    | 28. Russell.              |
| 14. Huron.                                       | 29. Stormont.             |
| 15. Kent.  | 30. Waterloo.             |
|  | 31. Welland.              |
|  | 32. Wentworth.            |

## The Cities of—

- |               |             |
|---------------|-------------|
| 33. Kingston. | 35. Ottawa. |
| 34. London.   |             |

## The Provisional County of—

36. Haliburton; and

## The Districts of—

- |                |                      |
|----------------|----------------------|
| 37. Algoma.    | 40. Parry Sound.     |
| 38. Muskoka.   | 41. Rainy River, and |
| 39. Nipissing. | 42. Thunder Bay.     |

*Part 2.*

The undermentioned ELECTORAL DISTRICTS, as set forth in Chapter 7 of the Revised Statutes of Ontario, 1887 (except as otherwise mentioned), constitute separate registry divisions:—

- |  |  |
|--|--|
| 43. Durham, East Riding.                               | 49. Northumberland, West Riding,<br>and the township of South<br>Monaghan. |
| 44. Durham, West Riding.                               |  |
| 45. Lanark, North Riding, excepting<br>Carleton Place. | 50. Perth, North Riding and the<br>township of Logan.                      |
| 46. Lanark, South Riding, and Carle-<br>ton Place.     | 51. Perth, South Riding, excepting<br>the township of Logan.               |
| 47. Middlesex, West Riding.                            | 52. York, North Riding.  |
| 48. Northumberland, East Riding.                       |  |

53. The East and North Ridings of Middlesex constitute one registry division ;  
and  
54. The East and West Ridings of York constitute one registry division.

*Part 3.*

The undermentioned registry divisions are constituted as hereinafter set forth:—

55. East Toronto consists of all that part of the city of Toronto lying east of Spadina Avenue and Spadina Road, continued south and north, to the boundaries of the city, and shall include the land on Spadina Avenue now occupied by Knox College, and the Island lying south of the city of Toronto.
56. West Toronto consists of all that part of the said city lying west of Spadina Avenue and Spadina Road, continued as aforesaid to the boundaries of the city.
57. The county of Simcoe consists of the townships of Adjala, Essa, Flos, West Gwillimbury, Innisfil, Matchedash, Medonte, Nattawasaga, North Orillia, South Orillia, Oro, Sunnidale, Tay, Tecumseth, Tiny, Tosorontio, and Vespra ; the towns of Barrie, Collingwood, Orillia and Penetanguishene, and the incorporated villages of Alliston, Bradford, Midland, Stayner, Beeton and Tottenham.
58. The county of Victoria consists of the townships of Bexley, Carden, Dalton, Digby, Eldon, Emily, Fenelon, Laxton, Longford, Mariposa, Ops, Somerville and Verulam ; the town of Lindsay and the incorporated villages of Bobcaygeon, Fenelon Falls, Woodville, and Omemee.
59. Grey, North Riding, consists of the townships of Collingwood, Derby, Euphrasia, Holland, Keppel, St. Vincent, Sarawak, Sullivan and Sydenham, and the towns of Meaford, Owen Sound and Thornbury.
60. Grey, South Riding, consists of the townships of Artemesia, Bentineck, Egremont, Glenelg, Normanby, Osprey and Proton, and the town of Durham.
61. Wellington, North Riding, consists of the townships of Arthur, Minto, Maryborough, Peel and West Luther ; the towns of Harriston, Mount Forrest and Palmerston, and the incorporated villages of Arthur, Clifford and Drayton.
62. Wellington, South and Centre Ridings, consists of the townships of Guelph, Eramosa, Erin, Nichol, Pilkington, West Garafraxa and Puslinch ; the city of Guelph, and the incorporated villages of Elora, Fergus and Erin.

NOTE.—The townships hereinbefore mentioned include all towns and incorporated villages situated within the limits thereof respectively

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57 VIC. CHAPTER 35.

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## 57 VIC. CHAPTER 35.

### An Act to amend The Registry Act, 1893.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The mortgagee named in any mortgage, hereafter executed, or the solicitor or agent of such mortgagee, may endorse thereon the words "not to be registered in full," and in such case the Registrar shall register the mortgage in the manner provided by *The Registry Act, 1893*, in the case of mortgages affecting lands, except that such mortgage shall not be copied into the books kept for that purpose in the registry office.

Mortgages not registered in full.

56 V. c. 21.

(2) Upon registration in the manner provided by sub-section 1 of this section, the fee payable for registration of any mortgage, not including more than four distinct parcels of land, having a separate heading in the abstract index, shall be \$1, and for each additional lot or part of lot thereafter requiring entry to be made under a separate heading in the abstract index, 5 cents.

Fee on registration.

(3) After the registration of any mortgage in the manner hereinbefore provided, the Registrar, upon the application of any person claiming to be interested in the mortgaged lands, and upon payment of the fees prescribed by *The Registry Act, 1893*, less the amount already paid for registration under this Act, shall cause such mortgage to be copied out in full in the book kept for that purpose in the registry office.

Subsequent registry in full.

56 V. c. 21.

(4) It shall be the duty of the registrar to indicate in the abstract index, in the case of the registration of every mortgage hereafter, whether the same has or has not been registered in full, by marking opposite the same in the said abstract index the words "registered in full," or "not registered in full," as the case may be.

Note in abstract index as to manner of registration.

*Object and defects of 57 V. c. 35, s. 1:—*The object of the first section of 57 V. c. 35 is the saving of registration

charges on the lengthy mortgages in use by some loan companies and building societies. The disbursement of from two to three dollars forms an unpleasant and unprofitable item in the scale of solicitors' fees in connection with loans, and causes an otherwise fair remuneration to appear excessive.

At the same time there is a danger that, if the instrument is not recorded verbatim in the books of the Registrar, alterations may be made in the terms of the mortgage contract. This danger is an especial one in the busier registry offices where no sufficient watch can be kept over those who are at work with the ever-ready fountain pen, and where instances are not wanting of title searchers bringing back to the registry office original instruments which by mistake they had gathered up and carried off among their own papers.

Moreover, there is the slight counterbalancing disadvantage that ten cents will be payable to search the original of every mortgage mentioned in the abstract in place of the five cents heretofore paid for searching the copy at large in the book.

Another slight inconsistency is that a mortgage itself may not be entered in full while the certificate discharging it is still in all cases fully copied.

Registration of notice of sale.  
Rev. Stat. c. 102.

2. (1) A notice of sale of lands under the provisions of the *Act respecting Mortgage of Real Estate*, and every notice of exercising the power of sale contained in any mortgage may be registered in the registry office of the registry division in which the lands are situated, in the same manner as any other instrument affecting the land, except that it shall not be necessary to copy the notice or affidavits or declarations attached thereto in any of the registers, and such registration shall have the same effect, and the duties of the Registrar in respect of the same shall be as in the case of any other registered instrument except as to the copying thereof, and the fee to be paid such Registrar for registering the same shall be fifty cents.

(2) The affidavit or declaration for the purpose of registering the notice shall be made by the person who served the same, and shall prove the time, place and manner of such service, and that the copy delivered to the Registrar is a true copy of the notice served.

Proof for registration.

(3) A copy of such registered notice and affidavit or declaration certified under the hand and seal of office of the Registrar shall in all cases be received as *prima facie* evidence of the facts therein stated.

Evidence of registration.

*Registration of notice of exercising power of sale :—*  
It was becoming quite customary to deposit the "sale papers" under the custody of *Title Deeds Act* (m), but such deposit was not obligatory, nor had it any effect on the evidentiary value of the sale-papers.

3. Sub-section 3 of section 96 of *The Registry Act, 1893*, is amended by adding at the end thereof the words following :—  
except in cases where an instrument has been duly executed and any party thereto has died prior to the registration thereof, or in cases where it would, in the opinion of the registrar, be inconvenient or impossible to obtain a new instrument containing the proper description, in which case such instrument may be registered if accompanied by an affidavit annexed thereto or endorsed thereon to the following effect :—

56 V. c. 21, s. 96, amended.

Death of party executing instrument before it is registered.

County of } I (give name, address and occupation.)

To Wit : } make oath and say.

1. To the best of my knowledge and belief the lands described in the within (or annexed) instrument and duplicate are designated on Registered Plan No. as lots (describe same so as to conform to plan).

2. That a party to the said instrument died on or about the day of A. D. [or (as the case may be) that it would be inconvenient (or impossible) to obtain a new instrument or a re-execution of the said instrument containing a description conforming to the said plan].

3. That I have a personal knowledge of the matters herein deposed to.

Sworn, etc.

(m) R. S. O. 1887, c. 115, *supra*.

And the Registrar, on receiving such instrument shall enter the same under the lots designated in the affidavit in the abstract index in which the subdivision is entered, and no entry shall be made under the lot or lots prior to the subdivision.

56 V.  
c. 21, s. 35,  
amended.

4. Section 35 of the said Act is amended by striking out the figures "25" in the 5th line thereof and substituting therefor "29."

56 V. c. 21  
amended.

5. The said Act is amended by adding thereto the following as section 132 :—

Repeal of  
former en-  
actments.

132. *The Registry Act*, chapter 114 of the Revised Statutes of Ontario, 1887, and the subsequent Acts amending the same and all Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed.

*Repeal clause* :—The necessity for and absence of a repeal clause in 56 V. c. 21 was pointed out in 29 C. L. J. 581.

Vic. c. 35.

shall enter  
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, and no  
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following

Statutes  
the same  
provisions

ce of a  
C. L. J.

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## GENERAL INDEX.

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## GENERAL INDEX.

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*The Acts printed in this work have been separately indexed alphabetically, and cross-references are made to these separate indexes.*

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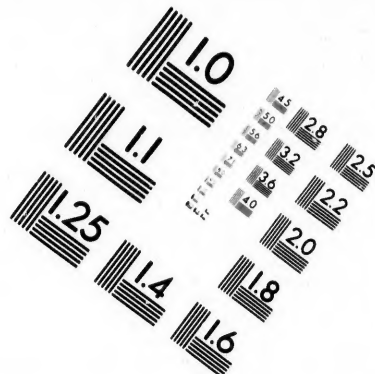
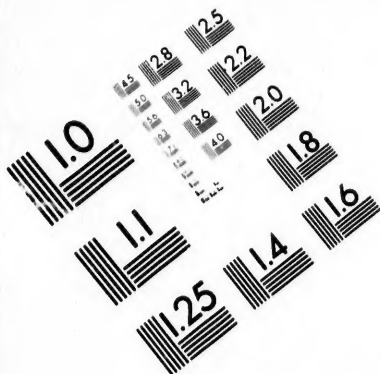
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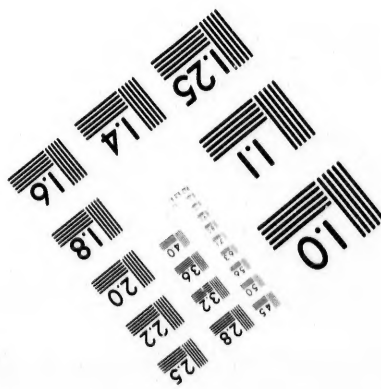
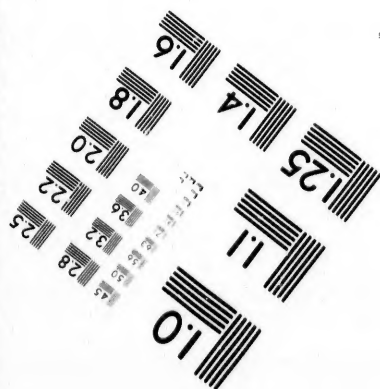
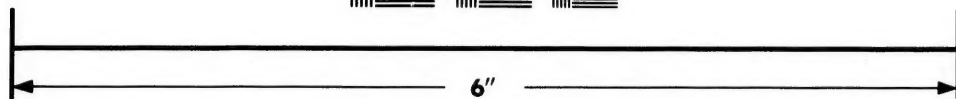
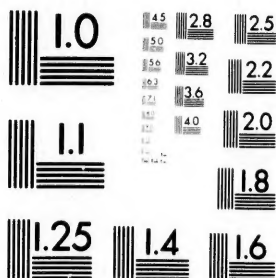
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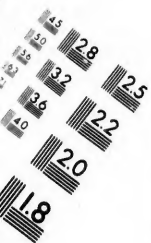


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